Supreme Court of the United States.

DECEMBER TERM, 1867.—Nos. 218 and 219.

SUPPLEMENTAL BILL.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANTS,

vs.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY, JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS OF GREENE C. BRONSON, DECEASED, AND WALLACE PRATT AND WILLIAM H. WHITE, APPELLEES.

CROSS BILL.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS, &c., APPELLANTS,

vs.

MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLEE.

The bill in this case, No. 218, was filed by the Minnesota company against the St. Paul company, Soutter and Knapp, survivors, &c., and Pratt and White, as a supplemental bill to the land-grant foreclosure suit of Bronson, Soutter and Knapp against the La Crosse and Minnesota companies and

others, on the western division of the La Crosse railroad. Bronson, Soutter and Knapp were the trustees in the mortgage, and complainants in the foreclosure suit. Soutter and Knapp, survivors of Bronson, are made defendants in that capacity. Pratt and White were the purchasers at the foreclosure sale, and organized the St. Paul company and conveyed the property to it.

Soutter and Knapp, trustees, as survivors of Bronson, bring the cross bill to enforce a supplemental mortgage given to them by the La Crosse company in aid of the original land-grant mortgage. The bill of complaint of the Minnesota company sets forth that the La Crosse company, on the 21st of June, 1858, made its mortgage to William Barnes, subject to prior mortgages, to secure two millions of dollars, and issued its bonds for that amount, and on the 11th day of August made a further mortgage, as security for said bonds which said mortgages purported to convey to said Barnes, said La Crosse and Milwaukee railroad, from Milwaukee to La Crosse, and "all and singular the locomotive engines and other rolling stock, and all the other equipments, of every kind and description, which had then been, or might thereafter be, procured for or used on said railroad, and all the materials, tools, implements, utensils, and other personal property which had then been, or might thereafter be, procured for, or used in connection with, such railroad."

That such bonds were disposed of, and that about the 1st of February, 1859, the said company having made default in the payment of the interest, said Barnes, as such trustee, advertised the said mortgaged premises for sale at public auction, and on the 21st day of May, 1859, said Barnes sold said premises to himself as purchaser, and thereby foreclosed the right and equity of redemption of said La Crosse company, and Barnes thereby became the owner in trust of said premises for the bondholders; and that said Barnes and said bondholders, on the 23d day of May, 1859, organized the said Minnesota company, and that thereby said Minnesota company became

the successor of said La Crosse company, and entitled to its rights and privileges, and the owner of said premises, subject to prior liens; and that said Minnesota company, as such purchaser, has a right to be treated, and has all the rights and privileges of a creditor of said La Crosse company. Said bill then sets forth the giving of the mortgage to Francis A. Palmer, on the eastern division, said land-grant mortgage on the western division, and the mortgage to Bronson and Soutter, on the eastern division, all of which mortgages were prior to the mortgage to said Barnes, and to all of which the Barnes mortgage is subject by its terms; that on the 5th day of December, 1859, Bronson, Soutter and Knapp exhibited the bill to foreclose the land-grant mortgage, and on the 9th day of said December, Bronson and Soutter exhibited their bill to foreclose the second mortgage, so called, on the eastern division, and the respective complainants were not made defendants in the other of said suits, or either of them. Neither of said mortgages or bills of foreclosure pretended to enumerate the particular rolling stock covered by it, and the said Minnesota company was made a party defendant in both of said foreclosure suits. Said bill then sets forth the order of reference in said foreclosure suits, the report of the special masters thereon, the exceptions thereto, the order of the court, and the final decision of foreclosure, marshal's report of sale and confirmation, and exhibits are made of all said mortgages, bills of foreclosure, orders, reports and exceptions, and attached to said bill of complaint. Said bill then sets forth that said Pratt and White, as purchasers, organized said St. Paul company, and said company became the successor of the La Crosse company, and of said Minnesota company, as to said western division; that no proceedings were ever had to determine what the net earnings of the western division were while operated by the receiver, and alleges that there were no net earnings of that division. Said bill then sets out the appointment of Hans Crocker as receiver, in several suits; sets out the proceedings in the second mortgage suit of Bronson and

Soutter, the reference, report and final decree therein, copies of which are attached as exhibits, and that Hans Crocker still remains as receiver in said suit, and therefore complainant is unable to take possession of said railroad and rolling stock, and alleges that Crocker's appointment as receiver on a prior lien rendered his appointment on a subsequent lien inoperative. Said bill further sets out that said St. Paul company, intending to injure, &c., fraudulently and falsely claims and pretends that it, by virtue of the purchase at the foreclosure sale of the land-grant mortgage, and the confirmation thereof, and the organization of said company, became, as against said Minnesota company, the owner in fee of all the rolling stock which was upon said railroad at the time of the appointment of the receiver, and all the rolling stock purchased by the receiver, and all the franchises which belonged to the said La Crosse and Milwaukee company, and also the franchise to operate the eastern division of said road; that said St. Paul company fraudulently combined and confederated with said Crocker to let said St. Paul company into the possession thereof, and that Judge Miller made an order allowing it, and thereupon, on the 12th of June, 1863, said St. Paul company entered into possession of said rolling stock and said eastern division, and still remains in possession thereof, and ever since then has used said rolling stock on said western division, and should pay a reasonable rent therefor, which would amount to $200,000; that on the 24th day of April, 1864, said orders were rescinded, but that said Crocker has neglected to take possession thereof, and said St. Paul company still remains in possession thereof; that said St. Paul company is building a competing line of road that will greatly injure said complainant, and threatens to disconnect the western division from the eastern of said La Crosse Railroad; that the orders of the court were purposely made vague to vex and oppress said complainant, and that it is greatly injured and oppressed by said St. Paul company, having possession of said rolling stock and said eastern division, and unless the rights of said St. Paul

and Minnesota companies are ascertained and determined it will be in the power of the St. Paul company greatly to oppress and injure said complainant, and that said St. Paul company is using said stock improperly, and greatly injuring it.

Said bill then asks that said complainant may be declared the owner in fee of said stock, and entitled to the possession thereof; that an account may be taken of the road while in the hands of a receiver, and a division made of the rolling stock purchased by the receiver, and that an account may be taken for the use of said rolling stock, and a recovery had against said St. Paul company therefor, and that the St. Paul company may be perpetually enjoined from interfering with said eastern division, or setting up any right or claim to any part of the rolling stock that was on said road when the receiver took possession, except the forty box cars. (This bill is not found in the printed record in Nos. 218 and 219, but is found in record No. 279, of December term, 1864.

The defendant demured to this bill, and it was dismissed, the judges being divided in opinion. An appeal was taken to the Supreme Court at December term, 1864, when the appeal as 279 of that term was heard out of its regular order, and the decree of the court below reversed by a divided court, and is reported in 2 Wallace, 283.

On the 24th of May, 1865, the defendant, Milwaukee and St. Paul railway company, filed its answer to said bill, which is found pp. 5 to 36 of Record.

Said answer admits the making of the mortgage to Barnes, but insists that it was a fraud upon the La Crosse company, and that the bonds were not sold, except a small part thereof, which were exchanged for the debts of the company, but were divided up among the directors and their friends at the rate of five cents on the dollar, and gives the particular disposition of said bonds. The said bonds never passed into general circulation, but were always owned and controlled by the parties who took them, with full knowledge of the fraudulent manner in which they were issued, and that Albert C. Gun-

nison was one of the directors of said La Crosse company, and of the executive committee that caused the issue of said bonds, and that he is a director of said Minnesota company, and has been for some years, and that said Gunnison and his associates, who participated in and were cognizant of said fraudulent issue of said bonds, now own and control and have the management of said Minnesota company. The answer then denies the validity of the foreclosure of said mortgage, and claims that it was fraudulent, and sets out the defects at length, and denies that the Minnesota company ever came into possession of said La Crosse road, or that it ever became the successor, or succeeded to the rights of the La Crosse company; denies that the Minnesota company is a creditor of the La Crosse company; admits the mortgages to Palmer, Bronson, Soutter and Knapp, and Bronson and Soutter, and claims that the La Crosse railroad company was one corporation, its railroad one continuous line, that all the rolling stock was purchased for the common benefit of the whole road, and out of the common fund of the company, that no portion of it belonged, was assigned, or pertained to one division of said road as against the other, *but was all procured for and used on the entire length of said road*, without respect to the divisions thereof, and that all the mortgages given by said company were intended to include, and did include, all the rolling stock on the whole road belonging to said company, and that said mortgages did become liens, and were intended to become liens, upon the whole of said rolling stock, as well that acquired before as that subsequently acquired, in the order of time in which said mortgages were given, and that it was the intention of said mortgages to convey the whole of said rolling stock to the mortgagees in each mortgage, and that the mortgage to Bronson, Soutter and Knapp conveyed to them all the rolling stock of said La Crosse company, and that their right thereto is prior and superior to the claims or liens thereon subsequently created by said La Crosse company. Admits filing bills of foreclosure by Bronson, Soutter and Knapp, and Bronson and Soutter, as alleged.

That the mortgage given to Bronson, Soutter and Knapp described said rolling stock as "all and singular the locomotive engines and other rolling stock, and all other equipments, of every kind and description, which have already been, or may hereafter be, procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils and other personal property which have been, or may hereafter be, procured for or used in connection with said roads, or either of them," and the description in the mortgage to Bronson and Soutter, and to Barnes, was in the same words precisely, and the bill of complaint in each case claimed the whole of the rolling stock that had been procured for or used on said road.

The answer admits the reference of March 11th, 1861, to the special masters, but says it was not for the purpose of ascertaining what rolling stock was included in said mortgage, but to ascertain what part of it had been purchased with the proceeds of land-grant bonds, as the district judge held that as to such part of said rolling stock the land-grant mortgage would be a lien thereon superior to the prior mortgages. Admits the making of the final decree, but denies that it adjudicates that all the rolling stock on the whole La Crosse road, except forty box cars, was a fixture to the eastern division, but insists that the decree adjudicates that all the rolling stock on said road was subject to its lien, and that as to said forty box cars, and said proportion of rolling stock purchased by the receiver, that it was a first lien. Read pp. 14 and 15 of Record. The answer then sets forth the advertisement and report of sale, the filing of exceptions and confirmations, and claims that the confirmation is an ajudication binding upon the Minnesota company.

Record, pp. 16 and 17.

The answer further sets forth that Pratt and White organized the St. Paul company, and conveyed to it the premises so purchased by them; that on the 6th day of May the St. Paul company applied to be let into the premises purchased, and an issue was thereupon made by the Minnesota company as to

what was included in that purchase, which was decided by the court. Record, pp. 18 and 19. That under and by virtue of the purchase so, as aforesaid, made, there was delivered to said St. Paul company, on the order of the court, by said receiver, the western division of said railroad, from Portage City to La Crosse, said forty box cars, and the proportion of rolling stock purchased by the receiver, belonging to said western division, free and clear from all incumbrance, and all of the rest of the rolling stock on said La Crosse road, when the receiver took possession, subject to mortgages prior in date to said land-grant mortgage. The answer then sets forth that the amount of the land grant decree at the time of the sale was $3,921,291, and that the proceeds of said marshal's sale was $2,800,000, and that the sum of $1,128,291, and interest from April 25th, 1863, still remains unpaid, and the St. Paul company is the owner of said indebtedness, excepting the sum of about $25,000.

The answer denies all intention to injure said complainant, or that it ever confederated with said Hans Crocker, as charged in said bill; denies that it is indebted for the use of said rolling stock, and insists that since the first day of May, 1864, this defendant has operated said eastern division of said railroad, under the receiver and by his direction and subject to his control, and not otherwise. And this the defendant insists, that in virtue of the foreclosure of said land-grant mortgage, and its purchase of said road, it acquired the right to disconnect said western division from said eastern division, and operate the same in connection with its other roads, and that at the time said land-grant mortgage was executed the road by the way of Watertown was a part of said La Crosse railroad, and denies the several remaining allegations of the bill, and suggests a defect of parties in said bill.

Soutter and Knapp, survivors of Bronson, answered said bill, and set up the same matters, and in substantially the same language, as in the answer of the St. Paul company so far as said bill relates to said trustees, the giving of said land-

grant mortgage, the foreclosure thereof and sale to said Pratt and White.

Record, pp. 37 to 47.

September 19, 1865, Soutter and Knapp, and the St. Paul company applied to the court for leave to amend their answers, and the said Soutter and Knapp asked and obtained leave to file a cross bill.

Said Soutter and Knapp afterward sand on the same day exhibited their cross bill against said Minnesota company, which set forth the supplemental bill and the proceedings thereon, and further stated, that as they were advised, believed and now beleive said land-grant mortgage was intended to cover and in fact did cover and include all the rolling stock, personal property and equipments, which were on said road on the 11th day of June, 1860, of which the receiver took possession; but that after giving said mortgage said company became embarrassed in its financial operations, and some doubt and apprehension was felt by the bonholders under it, as to whether said mortgage did cover and include all the iron, locomotives, cars engines, tools and other personal property, belonging to said company, and in order to solve said doubt, application was made to said La Crosse company to execute a supplemental mortgage thereon to the trustees in the land-grant mortgage for the further security of said bonds, and that on said request and in pursuance of the covenants, for further assurance, said La Crosse company on the 4th day of September, 1867, excuted a supplemental mortgage conveying to said Bronson Soutter and Knapp, all the iron rails of said company not laid down in its track. And all and singular the locomotives, cars, engines, tools, materials, lumber, office furniture, and personal property of every description, belonging to said company wherever the same might be, as a further security to said bonds, which mortgage was duly recorded in the Office of the Secretary of State of Wisconsin, on the 5th day of September, 1857. That on said 4th day of September 1857, said La Crosse company was the owner of all the rolling Stock, of which said Hans Crocker

took possession on the 11th day of June, 1860. That it was omitted to plead this mortgage through the mistake or inadvertence of the counsel who drew the original bill of foreclosure, but without the knowledge or information of complainants, and that said suit proceeded to a decree under the belief that said original mortgage covered the whole of said rolling stock, and that $1,129,201 and interest thereon from the 25th day of April, 1863, still remains unpaid on said land-grant bonds, and the complainant insists that under said mortgage, they were entitled to the possession, control and use of said rolling stock, and to have the same sold to satisfy the amount still due, and prays for a foreclosure and receiver. A copy of said mortgage is attached as an exhibit to said bill.

Record, pp. 51 to 58.

And on the same day said Soutter and Knapp, survivors, &c., filed an amendment to their answer, setting forth in substance the matter contained in the cross bill.

Record, pp. 60 to 62.

On the same day the Milwaukee and St. Paul railway company filed an amendment to its answer, setting up the making of this supplemental mortgage, and claiming that although the court may be of the opinion that this defendant did not become the owner of said rolling stock, by virtue of the foreclosure and sale of the land-grant mortgage, yet, inasmuch as this defendant is the *cestui que trust* of said Soutter and Knapp, survivors, &c., trustees, and the owner as aforesaid of nearly all the bonds and debt secured by said mortgage, and is now in the lawful possession of said rolling stock; it submits that it is entitled to be treated as a mortgagee in possession of the mortgaged property, and that its possession cannot be questioned or disputed by the complainant, whose right and title is subject and inferior to the mortgages aforesaid, except upon a bill to redeem said property from said mortgages.

Record, pp. 66 and 67.

On the 13th day of January, 1866, said Minnesota company filed its answer to said cross bill, denying the statements

of the cross bill, and claiming that said supplemental mortgage was given to defraud the creditors of the La Crosse company and to cover up its property; that it is a chattel mortgage and not properly filed, and that it cannot be enforced; that complainants had foreclosed this mortgage; that said supplemental mortgage was issued subsequent to the mortgage to Bronson and Soutter, and sets out Crocker's accounting as receiver, and Palmer's report, the order of the court thereon, and claims it as an estoppel on the St. Paul company, and a final and binding adjudication of its rights in the premises; sets up that the decree in the case of Soutter, survivor, on the east division, the orders of the 18th of July, 1865, and decree of sale, and alleges that John W. Cary, counsel of St. Paul company, was counsel for Soutter, and prepared decrees; that Soutter enforced decree, and it was paid up by the Minnesota company, and insists upon said decree and subsequent proceedings as an estoppel against the rights set up in said cross bill; states that proceedings in Soutter's foreclosure suit were conducted by John W. Cary, counsel of Soutter and Knapp and of St. Paul company, and that Sage, James and Cowdrey were owners of bonds under Soutter's mortgage, and that their procuring and enforcing that decree is an estoppel on their setting up any claim under said supplemental mortgage.

Record, pp. 77 to 85.

On the 9th of April, 1866, the Minnesota company filed an amendment to the prayer of said supplemental bill, praying that the St. Paul company might not operate the western division of said road separate from or in competition with said eastern division, but that said eastern division might use said western division, and run their trains over it, the same as before the purchase by the St. Paul company.

On the same day the said Minnesota company filed a second supplemental bill, which sets out the proceedings in the Soutter foreclosure suit on the east division, in reference to the receiver's accounting, the report of the auditor and the orders of the court thereon, which are the matters, proceedings and

orders contained in Nos. 43 and 62, argued at last term, and claiming that they are a complete and full adjudication of all the rights of the St. Paul company to said rolling stock, and a settlement of the ownership thereof, and that thereby the St. Paul company is estopped to set up or claim any rights in regard to said rolling stock; again sets up the same matter above stated relative to John W. Cary acting for Soutter and for the St. Paul company, the interests of certain of the directors and stockholders of the St. Paul company in said Soutter mortgage, the payment by said Minnesota company of the Soutter decree, and the distribution of the money among the bondholders, and that the St. Paul company is thereby estopped from claiming any interest in said rolling stock. The bill sets out the acquiring by the St. Paul company of the route to Milwaukee by way of Watertown, and operating the same in connection with the west division, and claims it can only run the western division in connection with the eastern, that it was so run by the St. Paul company until the 28th of August, 1864, and that it has since been run by way of Watertown, to the great damage of the Minnesota company, and claims that the Minnesota company has the right to run trains from Milwaukee to La Crosse over the road of the St. Paul company from Portage to La Crosse, and prays that the St. Paul company may be enjoined from using their road disconnected from the east division, and that the Minnesota company has the right to run trains over the road of the St. Paul company, and to charge said company for the use of rolling stock, and that the St. Paul company may be compelled to account to the Minnesota company for all through business carried over its road since June 12th, 1863.

Record, pp. 118 to 130.

The St. Paul company demurred to so much of said bill as did not relate to the rolling stock, and as seeks discovery and relief in matters and things distinct and different from said rolling stock; 1st, because such matters are subjects of an

original and not supplemental bill; 2d, because those matters should not be joined with said supplemental bill; 3d, because this court had not jurisdiction of those matters between these parties, and 4th, because the matters referred to do not make a case entitling said complainant to relief. Said company answered the rest of said bill, denying that said St. Paul company submitted itself to the jurisdiction of the court on said accounting, except by excepting to said report; denies that the court did or could, or did intend, to adjudicate on the question of the ownership of the rolling stock which was on the La Crosse road when the receiver was appointed, or that all of said rolling stock belonged to the complainant, except forty box cars, in and by its order disposing of said exceptions, and settling said account; denies that John W. Cary was counsel for James T. Soutter in this court, in the second mortgage case, or that the decree of sale in that case was prepared on his advice. Admits Soutter, survivor, proceeded to execute his decree, and that the Minnesota company paid the money, and that it was distributed to the holders of the bonds; that the stockholders of the St. Paul company held some of those bonds, and that said company held sixty-six and no more, and that it received its interest on said bonds out of said money, but denies that said decree of sale and subsequent proceedings had any effect upon the title of the defendant to the rolling stock in question between this defendant and said complainant, and insists that the payment of said money by said complainant was at the peril of the said complainant, and can have no effect upon this defendant's title to said rolling stock. This demurrer and answer by stipulation was to serve as the demurrer and answer of Soutter and Knapp.

Record, pp. 177 to 180.

The answers were all replied to, and testimony taken, after which the bills and cross bill were dismissed, on division of opinion of the court.

Record, pp. 182 and 183.

The Minnesota company, to maintain the issue on its part, produced testimony as follows:

The deposition of Russel Sage, then president of the St. Paul Company.—This deposition relates almost exclusively to the financial condition of the St. Paul company at the time it was taken, the amount of its stock, bonds, floating debt, but contains nothing relative to the title or ownership of the rolling stock in question, or any other matter material to the issue involved.

Record, pp. 185 to 195.

The deposition of Andrew Reasoner, superintendent of the St. Paul company, was read by complainant, and relates wholly to competition on railroad lines, and as to whether the eastern division of the La Crosse railroad is a competing road with the St. Paul road for through business from Milwaukee to the Mississippi river, and contains nothing material to the question now at issue.

Record, pp. 201 to 205.

The deposition of Edwin H. Goodrich, taken April 13th, 1866, was read by complainant. He testified that he was a director of the La Crosse company from its organization to 1858; recollects giving the supplemental mortgage to Bronson, Soutter and Knapp, Sept. 4th, 1857. The company was financially embarrassed in 1857; the company had a large amount of railroad iron and other movable property at Milwaukee and on its line, and for the purpose of securing and keeping possession of the said iron, with which to complete its road from Portage City to La Crosse, and for the purpose of keeping possession of its rolling stock and personal property, as against attachments and executions, that mortgage was executed. I had no knowledge of any request ever having been made by the trustees of the land-grant mortgage or any other persons outside of the board for its execution. The trustees were not present, or any one representing them, to my knowledge, and I have no knowledge of its delivery.

Also testified that the connection by way of Watertown was made by St. Paul company Sept. 1st, 1864, and after that all through business went by that line, and the eastern division was operated as a local road from Milwaukee to Portage. Of the rolling stock on the La Crosse road when the receivers took possession, one locomotive costing $1500, five first-class passenger cars and sixteen box cars were purchased after the giving the mortgage of Sept. 4th, 1857; this locomotive was paid for by the receiver, and the receiver paid a portion of the price of the passenger cars. The eleven thousand tons of iron was bought of Vose, Livingston & Co., and paid for wholly in land-grant bonds. No part of the land-grant road was then built, and the value of the bonds were entirely dependent on the building of the road conveyed in the land-grant mortgage.

Record, pp. 205 to 207.

Another deposition of Goodrich's was read, relating to the running of trains, but is not material.

Record, pp. 195 to 200.

The deposition of Thos. L. Ogden was produced by complainant, in which he testifies that he submitted the decree of sale in the case of Soutter, survivor, to John W. Cary, as representing certain bondholders, and that he made no objection to it; that Mr. Cary had always insisted that the whole rolling stock on the La Crosse road when the receiver took possession belonged to the St. Paul company under the land-grant purchase; that he did not request that the description used in that decree relative to rolling stock should be inserted therein, but that said decree included all said rolling stock by express direction of Mr. Justice Miller.

Record, p. 208.

The complainant also produced a stipulation signed by the counsel of the parties, that all testimony taken by H. L. Palmer Esq. on the accounting in the case of Soutter, survivor, &c., might be read in this cause.

Record, p. 209.

The record, from page 209 to 575 is taken up with the testimony and exhibits introduced before H. L. Palmer in the accounting, and are contained in records 43 and 161 of this term, almost all of which is entirely foreign and irrelevant to the issues involved in this case, except as to the value of the use of rolling stock, which is not contested. The testimony taken by Mr. Palmer is almost exclusively devoted to ascertaining the amount that should be allowed for the use of rolling stock on the hypothesis that it belonged to the Minnesota company; that amount he ascertained and determined on that basis and for the amount so ascertained, the Circuit Court entered its order in the nature of a decree against the St. Paul company; from those decrees the St. Paul company has appealed, and they are now in this court as Nos. 43 and 161. No question is made in those appeals, as to the amount of said decrees, if the Minnesota company was the owner of said rolling stock, but it is insisted that there should be no decree, for the reason that said rolling stock was and is the property of the St. Paul company and not of the Minnesota company. Hence the whole mass of matter contained in this record, from pages 209 to 575, is of no consequence in this action, except the small part thereof that relates to the ownership of said rolling stock, and no farther notice will be taken of it, except to quote those passages.

The defendants in the supplemental bill and complainants, Sontter and Knapp, survivors, in the cross bill, introduced in evidence the deposition of Byron Kilbourn, on pages 575 to 579, Record, and the depositions of Hans Crocker, Alexander Mitchell and Henry L. Palmer, Record, pp. 599 to 604. The deposition of N. A. Cowdrey was also read, Record, 606 to 609, and the exhibits attached to the answer and cross-bill were read in evidence. Record, p. 609.

I.

The land-grant mortgage given by the La Crosse and Milwaukee Railroad Company to Bronson, Soutter and Knapp did in fact cover and include, and was intended to cover and include, all the rolling stock of said La Crosse and Milwaukee Railroad Company, of every kind and description, which said company ever procured for or used on said La Crosse and Milwaukee Railroad.

The La Crosse and Milwaukee Railroad was one continuous line of railroad extending from Milwaukee to La Crosse, a distance of two hundred miles. Originally, said company was chartered to build said line alone, but afterwards, and in 1856, the Legislature consolidated with it the Milwaukee and Watertown Railroad and a line for the land-grant road from Madison, by way of Portage, to St. Croix, sixty miles of which land grant was identical with the line of the original La Crosse road from Portage City westward.

No road was in fact ever built by said La Crosse company, except the original line from Milwaukee to La Crosse, and, except also, a few miles on the Watertown road. In the construction of said road, several mortgages were given by said La Crosse company in the following order as to time:

A mortgage to Francis A. Palmer, on the road from Milwaukee to Portage, a distance of ninety-five miles, usually called the eastern division.

The land-grant mortgage from Portage to La Crosse, also including the land-grant line, to Bronson, Soutter and Knapp.

The mortgage to Bronson and Soutter, called the second mortgage on the road from Milwaukee to Portage.

The mortgage to Helfenstein on the road from Portage to La Crosse.

The description of premises conveyed by the Palmer mortgage is as follows:

"All their [the said La Crosse and Milwaukee Railroad Company's] said road from its eastern termination in the city of Milwaukee to Portage City in the county of Columbia, being ninety five miles in distance, constructed and to be constructed, together with all and singular the railways, land procured or occupied, or so to be, for right of way within the limits aforesaid, together with bridges, fences, privileges, rights and real estate owned by said company for the purposes of said road, or which may hereafter be acquired or owned by them within the limits aforesaid, and all the tools, income, issues and profits to be had from the same, and all lands used and occupied within the limits aforesaid, by depots or stations, with all buildings standing thereon or which shall be procured therefor, together with all locomotives, engines and tenders, passenger cars and freight cars, shops, tools and machinery now owned, or hereafter to be acquired by said company, and in any way belonging or appertaining to said railroad now constructed and to be constructed within the limits aforesaid, including all its property, real and personal, pertaining to said railroad within said limits, and all its rights, credits and franchises thereunto appertaining."

And lastly, the mortgage to William Barnes on the whole road.

The grant in the land-grant mortgage to Bronson, Soutter and Knapp is in the words and figures following, to wit:

"*Now, therefore, this Deed Witnesseth*, That the said railroad company, in consideration of the premises, and of the sum of one dollar paid by said parties of the second part, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto said parties of the second part, all and singular, the several tracts, pieces or parcels of land which now are, or may hereafter be, or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute or be a part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from Portage City to La Crosse; and also, all and singular the superstructure of said roads, whether now made, or to be made hereafter, and all the engine-houses, workshops, depots and other buildings, and all other improvements on or

pertaining to said roads, whether now built and made, or to be built and made hereafter. *And also, all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them;* and also, all and singular the rights, liberties, privileges, and franchises of said railroad company, of every kind and description, relating to said roads.

"*And furthermore*, and upon the consideration aforesaid, the said railroad company has granted, bargained, sold, conveyed and confirmed, and does by these presents grant, bargain, sell, convey and confirm unto said parties of the second part, all and singular the lands granted or intended to be granted to said railroad company, under or by virtue of the act of Congress and the act of the Legislature of Wisconsin, hereinbefore mentioned, so far as the said lands pertain, or are applicable to the construction of the said roads from Madison, by way of Portage City, to the St. Croix river or lake, estimated to be about one million acres of land: Together with all and singular the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate hereby conveyed, or intended to be conveyed; and it is hereby declared to be the intention of the parties to these presents to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges and franchises of said railroad company, in respect to the roads above mentioned, as fully and amply as the same might be conveyed if the said railroads had already been fully constructed and equipped, and the particular lands granted by the foregoing acts of Congress and the Legislature, so far as the same are applicable to the construction of said road from Madison to St. Croix river or lake, had already been designated and conveyed to said railroad company."

Each one of said mortgages purports to convey the rolling stock of said company, and in all of them, except the Palmer mortgage, the grant of the rolling stock is in the precise words above quoted in the land-grant mortgage. All of which mortgages, except the Helfenstein, are attached as exhibits to the bill of complaint, and are in evidence in this cause.

Record 279, December Term, 1864, pp. 17 to 62.

This we insist is conclusive evidence that it was the intention of said company to mortgage the same rolling stock, and the whole thereof, in each one of said mortgages successively.

The La Crosse company was but one corporation, one legal existence, and as such, owned all its property, both real and personal. It had no separate funds or distinct properties, but one road and one property, which was all held in one and the same right. There was no separation, division or assignment of its rolling stock to any portion of its road, but it was all held, as was all the rest of its property and effects, as one common property, and in the same right and interest. All of its rolling stock was purchased for and owned by this company, and it was *all purchased for and used on* the entire length of road, without any division or separation. The complainants' bill does not pretend to allege anything different; the fact that a railroad company's rolling stock is common to its whole line and does not belong to a particular part thereof, is a matter of common observation and knowledge, o which the Court is bound to take notice, as the common rule in all such cases.

There never was any division of this road for any purpose whatever, except the company, for convenience of raising funds, made their first mortgage of the east ninety-five miles and subsequently mortgaged the west 105 miles. All the mortgages, as we have seen, in express terms cover the rolling stock of the road, and by the same description. There can be no doubt that the descriptions in these several mortgages were copied the one from the other, and that in making them the same identical rolling stock was intended to be conveyed, to wit, the rolling stock of the La Crosse company, used on its road. At the time the land-grant mortgage was executed, no part of the line of road described in said mortgage was built, and there was no rolling stock on that line. Hence, if the idea of our opponents is to prevail,

there was no propriety in granting rolling stock already procured. That expression could only refer to the rolling stock then owned by the company, and which was used on the eastern division.

It is insisted that the rolling stock of this company was divided and sub-divided to certain portions of the road, and that it was a fixture upon and belonged to such particular subdivisions, instead of being the property of the company used on the whole road, and it is finally claimed that only forty box cars were ever "procured for or used on" the western or land-grant division. The absurdity of this position will at once appear if we reflect for a moment that this two hundred miles of road was one great through route, operated as one road, and that while the company owned over $600,000 worth of rolling stock, that it was all *kept on, procured for, and used on the eastern ninety-five miles exclusively*, except forty box cars, which were the equipments and used on the western 105 miles. We are not informed how these forty box cars were propelled, or in what way the freight and passenger business was done. It will not answer for our opponents to say that any part of this rolling stock claimed to belong exclusively to the eastern division was used on the western division, because if it was the property of the La Crosse company, and used on or in connection with the western division, it was covered by our mortgage in express terms. A proposition so absurd needs no other refutation than its simple statement. There is no proof in this case, or in the whole history of this whole La Crosse litigation, showing, or tending to show, that this rolling stock, except 40 box cars, was a fixture to the eastern division, or that it was assigned or pertained to said eastern division as against the western 105 miles. On the contrary, there is ample proof that such was not the fact, and that there was never any assignment or setting apart of any part or portion of this rolling stock as against the other. We have the testimony of E. H. Goodrich on this very point.

He testifies that he was a director of the La Crosse and Milwaukee railroad company from the organization of the company until 1858.

Record, p. 205.

He further testifies as follows:

"Question. How long have you been engaged in railroad employment, and in what capacity?

"Answer. Have been engaged in railroad business nine years, and for eight years as superintendent and manager.

"Question. How long have you had the actual superintendence of the road from Milwaukee to La Crosse, sometimes called the La Crosse and Milwaukee railroad?

"Answer. Since some time in the year 1856; I cannot tell the date of my appointment.

"Question. By whom have you been employed as such?

"Answer. By the La Crosse and Milwaukee railroad company, by Selah Chamberlain, by Hans Crocker, receiver, by the Milwaukee and St. Paul railway company, and by Hans Crocker, receiver, again."

Record, 212.

On his cross examination he testified as follows: Record, 242.

"Question. Who purchased the rolling stock which the receiver took possession of on the 11th day of June, 1860, for what was it procured, and when and where was it used up to that time?

"Answer. Almost the entire quantity was purchased by the La Crosse and Milwaukee railroad company, to be used upon the road in the prosecution of its transportation business, and it was used for that purpose on the company's railroad between Milwaukee and La Crosse.

"Question. Was there ever any division of said rolling stock as between or as belonging to either division of said road as distinguished from the other?

"Answer. Not to my knowledge. There never was."

Byron Kilbourn testified as follows:

"I was connected with the La Crosse and Milwaukee company ftom its organization up to January, 1858. At the organization of the company I was a director. I was elected president of the company in February, 1856, and remained president until January, 1858. I was, during my whole connection with it, active in its business and conversant with its affairs.

"Question. Was the rolling stock that was purchased and placed upon the road during the time you were connected with it purchased for or assigned to any particular division of said road, or was it purchased for the whole road as an entirety? State fully.

"Objected to by the Minnesota company as irrelevant and immaterial.

"Answer. It was purchased for the whole road. I never knew of any being purchased for the divisions. None of it was ever assigned to one division as against another that I am aware of.

"Question. In the several mortgages that were executed by the company mortgaging the road, or parts of the road, together with all the rolling stock procured for or used on the road or parts of the road mortgaged, what rolling stock was it that was referred to?

"Objected to as above, and as incompetent to explain a written instrument by parol.

"Answer. It might be proper, explanatory, to say the first mortgage was on eastern division, and all the rolling stock was then used on the eastern division; but as the road was extended they extended the rolling stock on to it. The mortgages explain that for themselves. They embrace the road and rolling stock then owned by the company, and according to my recollection they embraced the road and rolling stock thereafter to be purchased. My impression is that each mortgage referred to all the rolling stock then owned by the company. The mortgage is evidence of that.

"Question. Was there ever any division of the rolling stock that was purchased and owned by the La Crosse company for any purpose whatever, or was it always treated as a whole or entirety by the company.

"Objected to as above.

"Answer. I am not aware of any division having been made. My opinion is, without time for reflection, that it was always held as an entirety, the property of the company."

Record, 576.

Henry L. Palmer testified that

"He was a director of said company; that there never was any division of rolling stock, or assignment of it to divisions of the road, and that the road was always operated as a through road, and the rolling stock also used upon it and operated as one road."

Record, 604.

There is no testimony in this cause, or in the whole litiga-

tion, contradicting or in any way militating against this evidence, and nothing whatever to show that the rolling stock of this road was ever assigned or belonged to one division of this road as against the other; but all the testimony concurs with the above, that the rolling stock belonged to the company, and was used on the whole road.

We therefore insist, 1st, that each one of these several mortgages covered and included all the rolling stock belonging to the La Crosse and Milwaukee company, and which had been purchased for or used on said railroad from Milwaukee to La Crosse. 2d, That this is equally so whether we regard said rolling stock as personal property, or a fixture or accession or incident to the road, and that if it is to be considered as a fixture or accession or incident it is only so as respects these mortgages as against other creditors, and that there is no pretence that it is a fixture to any particular portion or miles of the road.

3d. That these several mortgages became liens upon said rolling stock from the date of their execution, and that said liens have priority now in the order of time of their execution.

4th. That the La Crosse and Milwaukee Railroad Company, after giving these mortgages, could not be heard to dispute the right of any one of the mortgagees to all of this rolling stock; and as the mortgage to Barnes, out of which the Minnesota company grew, is by its terms expressly made subject to all the other mortgages, the Minnesota company stands in no better position than would the La Crosse Company, and is therefore estopped to dispute our title.

The Barnes mortgage contains this clause:

"This mortgage is subject to a first mortgage upon the eastern division of the railroad between Milwaukee and Portage City, to secure outstanding bonds of said company to the amount of about nine hundred and twenty-two thousand dollars; also bonds to the city of Milwaukee to the amount of three hundred and fourteen thousand dollars; also, to bonds secured by second mortgage on said eastern division, subject to the amount of one million dollars; also, subject to a mort-

gage of four million dollars upon the line of said road from Portage City to La Crosse, and to a second mortgage of about two hundred thousand dollars on the road from Portage City to La Crosse, and from the junction near the village of Tomah to the terminus of the road on the lake or river St. Croix."

Exhibit to Bill.

We therefore claim that the land-grant mortgage to Bronson, Soutter and Knapp was a lien upon all the rolling stock of the La Crosse Railroad purchased by that company, and of which the receiver took possession on the 11th day of June, 1860, and that said lien was prior and superior to every other lien or claim thereon, except the prior mortgage to Palmer.

II.

The decree of the district court followed the mortgage and included all the rolling stock of the La Crosse and Milwaukee railroad, of which the receiver took possession on the 11th day of June, 1860.

Different opinions have prevailed in regard to the nature of rolling stock, some of the courts considering it in its nature a fixture, and partaking of the road, while others have considered it personal property. The United States courts have held, however, that it is in its nature a fixture, and such is the settled rule of decision in those courts.

Pennock *vs.* Coe, 23 Howard, 47.

Prior to October 18th, 1856, there was no statute law in Wisconsin making rolling stock of a railroad a fixture. On that day an act was passed containing the following provisions:

SESSION LAWS OF 1856, PAGES 215 AND 216.

"SEC. 2. All rolling stock of any railroad company used and employed in connection with its railroad, shall be and the same are hereby declared to be fixtures; and all such property, and all such additional right of way, depot grounds and other real property acquired subsequently to the execution of any such trust deed or mortgage, upon the property therein described, to which such company had title at the time of the executions. * *

"SEC. 4. That all mortgages or trust deeds heretofore executed by any railroad company are hereby declared to be included within, and subject to the provisions of, this act, as fully and effectually as if its provisions had been incorporated in its charter prior to, and at the time of the execution of such mortgages or trust deeds. *Provided, however*, That such railroad company shall first accept of the provisions of this act by a resolution of its board of directors, and shall cause a copy thereof, under the certificate of its secretary, with the corporate seal thereof attached thereto, to be filed in the office of the secretary of state. *And provided further*, That that section shall not be construed in anywise to affect any liens acquired by any person or persons, corporation or body politic, upon such subsequently acquired property, at any time after the executio nof such mortgage, and prior to the filing the acceptance of the provisions of this act as above provided, in the offioe of secretary of state."

The courts of Wisconsin, prior to the passage of the act making it a fixture, were inclined to hold that rolling stock was not a fixture, but personal property.

Commercial Bank vs. Farmer's Loan and Trust Co., 11 Wis., 207.

Hill *et al* vs. La Crosse, 16 Wis. 214. The La Crosse company were seeking to guard against the effect of such a construction in giving the supplemental mortgage.

On the hearing in the court below, the complainants' counsel, following the rule of the Wisconsin courts, treated the rolling stock as in its nature personal property, and a fixture only by virtue of the statute, and that it was all included in the land-grant mortgage, and would pass under the sale on that mortgage to the purchaser, free and discharged of all lien of mortgages prior in date, which were executed previous to

the statute making it a fixture, for the reason that such prior mortgage not having been filed as a chattel mortgage was void as to the personal property therein contained.

Revised Statutes of Wis., p. 614, S. 9.

This position was overruled on the hearing, on the express ground that the rolling stock of the road was a fixture independent of the statute, and therefore, that the lien of the first mortgage, given previous to the statute making rolling stock a fixture, was good and valid without being filed as a chattel mortgage.

The following is an extract from the opinion of the District Judge.

Extract from the Judge's Opinion:

"The legislation of this State was evidently with the view of enabling railroad companies, and especially the La Crosse and Milwaukee Railroad Company, to raise money in advance, by bonds and mortgage, for the purpose of building their road and procuring rolling stock. The directors of this company were given almost unlimited license to make bonds and mortgages, payable in any manner they might deem proper, and to pledge or mortgage their property as security. By the terms of the mortgages, the rolling stock to be procured was pledged to secure the debt contracted for raising the means of its procurement. In equity those pledges should be sustained, and the persons who purchased the company's bonds and furnished the means of the procurement of the stock should be protected. And they also furnished the means for building the road, from which revenues have been derived to enable the company to procure rolling stock.

"From the best consideration I can give the subject, I think the rolling stock on the whole road is to be considered a fixture, and is pledged to the first mortgage of nine hundred and fifty thousand dollars, unless it can be shown affirmatively how much or what portion was procured by funds received out of the issue of land-grant bonds, and the second-mortgage bonds, or either of them. So much of the stock as can be shown to have been procured out of either of those issues, or out of the revenues of so much of the road as was built with funds arising out of those issues of bonds, respectively, will pass with the sales on said mortgages. The first mortgage is a lien on the road and fixtures from Milwaukee to Portage City. It

was the first pledge of the road and fixtures to creditors. And I apprehend it is the conveyance of the franchise of the corporation granted by its charter, as it is not probable that the corporation could divide its franchise by making mortgages of several parcels of the road property. That would be creating several corporations by deed of a company, to which the Legislature granted but one."

Record, p. 28.

On delivering this opinion, the Judge made an order of reference to certain masters, to report the amount due on the bonds, the amount due on certain judgments, the amount due on Chamberlain's lease, and also containing this clause:

"And it is further ordered that the said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and is included in this mortgage, and also in the first and second mortgages, respectively."

A full copy of this order is an exhibit to the complaint.

This order of reference is to be construed in the light of the opinion delivered at the time it was made. That opinion expressly held that all the rolling stock on the whole road was covered by the first mortgage, unless some of it had been purchased by the proceeds of the other mortgages. Hence the only inquiry open to the masters was as to whether any of the rolling stock had been purchased by the funds of the land-grant, or Bronson-Soutter mortgage. And the only testimony taken by them on that subject was that of E. H. Goodrich, and is as follows, to wit:

"At the date of the first mortgage there was no rolling stock on hand—June 30th, 1854.

"At the date of the mortgage to Bronson and Soutter—August 17, 1857—the cost of the rolling stock on hand was $544,492.16.

"At the date of the land-grant mortgage—31st December, 1856—the rolling stock on hand cost $455,001.06.

"At the date of the order of reference in these causes—11th March, 1861—the cost of rolling stock on hand was $623,235.78.

"None of the rolling-stock was purchased with land-grant bonds, but part of it was paid for with proceeds of the land-

grant bonds. Out of the proceeds of those bonds (issued under the mortgage to Bronson, Soutter and Knapp) three thousand dollars was paid for the right to use a car brake, and thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, were paid for forty box cars; the entire amount of rolling stock is about all on hand at this time, scarcely any having been destroyed.

"The whole sum paid for rolling stock out of the earnings of the road since 31st December, 1858, is $78,743.62, besides some small sums for transportation of rolling stock. Besides that, payments have been made out of the general earnings of the road for building rolling stock in the company's shops, on the eastern division of the road, as per report of the receiver, made December 31st, 1809."

Record, 609.

The masters filed their report October 7th, 1861, on the several matters referred to them.

So much of said report as relates to the rolling stock is as follows:

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, five hundred sixty-nine thousand six hundred thirty-five dollars and seventy-eight cents, and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount $623,235.78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406 and 408, are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased out of the proceeds of a portion of the bonds to which this mortgage is collateral, and all the remainder of said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the seventeenth day of August, A. D. 1856.

"In ascertaining the facts and amounts, and in making the

computations herein above contained and referred to, we have been guided by the opinions and instruction of this court, communicated to us in connection with the said order of reference.

"All which is respectfully submitted.

"Dated Milwaukee, 1st September, 1861."

This report is an exhibit to the bill.

To this report the complainant filed several exceptions, but the only one material was the fourth exception (Record, p. 133, and is in the words and figures following, to wit:

"4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except forty box cars which are specially named in said report) was covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857.

"Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600) was covered by and included in the mortgage given to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, one hundred and five two hundredths thereof was covered by the mortgage described in the complaint, and that to that extent the complainant's said mortgage was a first lien thereon.

"Wherefore said complainants except to the said master and special masters' said report, and appeal therefrom to the judgment of this honorable court."

Exhibit to supplemental bill.

Afterwards, on the 7th of January, 1862, the following order was made on said exception.

Record. p. 136.

"This day came the parties, by their counsel, and on consideration of the several exceptions to the report of the masters, and the arguments of counsel, it is ordered by the court that the first, second and third exceptions of complainants to said report be, and hereby are, overruled.

"And it is further ordered by the court that the fourth exception of complainants be and is hereby overruled as to the

forty box cars which are covered by this mortgage. And it is further ordered by the court that on said exception the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943.62, be applied to the said first mortgage, and the mortgage in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver.

At the time of making this order the district judge read in open court a written opinion disposing of the several matters raised by the several exceptions, and so much thereof as relates to the question at issue is as follows.

Exhibit to supplemental bill.

Extract from Opinion of the Judge on hearing exceptions, and directing entry of final decree:

"In obedience to the order of reference, the masters inquired into the quantity of rolling stock covered by this mortgage. They report that forty box cars, costing thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, giving their respective numbers, were purchased with funds raised on the bonds of this mortgage. They also report that the rolling stock on the road cost $623,235.78, and that all but those box cars are covered by the first and second mortgages. The complainants except to this part of the report, and claim the whole rolling stock. They found their claims upon the grounds that the rolling stock is personal property, and that the first mortgage was not filed as a chattel mortgage, and is therefore void as to the rolling stock. And that their mortgage was the first in date, after the act of October 10, 1856, declaring rolling stock to be real property. I do not think the statute for filing chattel mortgages is applicable to this species of property in actual use upon a railroad.

"The legislation of this state was evidently with a view of enabling railroad companies, and especially the La Crosse and Milwaukee railroad company, to raise money in advance, by bond or mortgage, for the purpose of building their railroad and procuring the rolling stock. The directors of this company were given almost unlimited license to make bond and mortgage payable in any manner they might deem proper, and

computations herein above contained and referred to, we have been guided by the opinions and instruction of this court, communicated to us in connection with the said order of reference.

"All which is respectfully submitted.

"Dated Milwaukee, 1st September, 1861."

This report is an exhibit to the bill.

To this report the complainant filed several exceptions, but the only one material was the fourth exception (Record, p. 133, and is in the words and figures following, to wit:

"4th. For that the said master and special masters have in and by their said report certified that all the rolling stock on said road (except forty box cars which are specially named in said report) was covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857.

"Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600) was covered by and included in the mortgage given to the said complainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, one hundred and five two hundredths thereof was covered by the mortgage described in the complaint, and that to that extent the complainant's said mortgage was a first lien thereon.

"Wherefore said complainants except to the said master and special masters' said report, and appeal therefrom to the judgment of this honorable court."

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"And it is further ordered by the court that the fourth exception of complainants be and is hereby overruled as to the

forty box cars which are covered by this mortgage. And it is further ordered by the court that on said exception the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943.62, be applied to the said first mortgage, and the mortgage in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver.

At the time of making this order the district judge read in open court a written opinion disposing of the several matters raised by the several exceptions, and so much thereof as relates to the question at issue is as follows.

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Extract from Opinion of the Judge on hearing exceptions, and directing entry of final decree:

"In obedience to the order of reference, the masters inquired into the quantity of rolling stock covered by this mortgage. They report that forty box cars, costing thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, giving their respective numbers, were purchased with funds raised on the bonds of this mortgage. They also report that the rolling stock on the road cost $623,235.78, and that all but those box cars are covered by the first and second mortgages. The complainants except to this part of the report, and claim the whole rolling stock. They found their claims upon the grounds that the rolling stock is personal property, and that the first mortgage was not filed as a chattel mortgage, and is therefore void as to the rolling stock. And that their mortgage was the first in date, after the act of October 10, 1856, declaring rolling stock to be real property. I do not think the statute for filing chattel mortgages is applicable to this species of property in actual use upon a railroad.

"The legislation of this state was evidently with a view of enabling railroad companies, and especially the La Crosse and Milwaukee railroad company, to raise money in advance, by bond or mortgage, for the purpose of building their railroad and procuring the rolling stock. The directors of this company were given almost unlimited license to make bond and mortgage payable in any manner they might deem proper, and

to pledge or mortgage their property as security. By the terms of the mortgage the rolling stock to be procured was pledged to secure the debt contracted for raising the means of its procurement. In equity, those pledges should be sustained, and the persons who purchased the company's bonds, and furnished the means for the procurement of the stock, should be protected. And they also furnished the means for building the road, from which revenues have been derived to enable the company to procure rolling stock. This matter is fully settled as authority to this court in the case of Pennock *vs.* Coe, 23 Howard, 117. The rolling stock was procured by the company, as owners, and adapted to the road as the means of operating; and so long as it is thus used, it should be considered as fixtures, even without statute law. The first mortgage covered all the after acquired rolling stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgage; to that extent those mortgages should have a superior equity. For these reasons the exception will be overruled. But the decree will, in addition to the forty box cars reported by the masters, allow to this mortgage its share of the rolling stock purchased and procured by the receiver, costing $147,942, in proportion to the net revenues."

Record, 29.

It is evident, from an examination of these proceedings that the question there litigated was as to the *priority of lien*, and not as to whether the land-grant mortgage *was* a lien. The lien of that mortgage was not denied, but the sole question was as to its priority. This fact is evident from the whole proceedings in the case, and especially from the opinions delivered by the court below.

It has been argued and assumed that the court below found and adjudged this rolling stock, except forty box cars, to be a fixture to the eastern ninety-five miles of said road. Such is not the fact; but, on the contrary, the adjudication of the court is in direct conflict therewith. The order of reference directed the masters to report what rolling stock was covered by the first or Palmer mortgage, and what by the second or Bronson and Soutter mortgage. These two mortgages covered the same piece of road (the eastern ninety-five miles), consequently if the court found and adjudged this rolling stock

a fixture to said piece of road, it should be covered by both of these mortgages. The masters reported that this rolling stock was included in said first and second mortgages, but the court, on the exception of the complainants, modified said report by striking out so much thereof as found that this rolling stock was included in said second mortgage. This action is in irreconcilable conflict with the view of the case so often and earnestly advocated by Mr. Carpenter, and in order to save his theory he was forced to place the court below in the very ridiculous position of holding that this rolling stock was a fixture to said ninety-five miles of road, and yet that a mortgage on said ninety-five miles, and by its terms expressly including all said rolling stock, did not include any part of it. (See his briefs in ~~No. 279 of the term of 1864~~, page ~~18, and also~~ in ~~original case No. 10 of the term of 1866, pages 20 and 21~~.)

A construction of the orders and decree that will force the court below into such a ridiculous and absurd position should not be hastily adopted.

A proper and just construction leads to no such absurdity. The issue or contest before the court below upon this point was as to the priority of the land grant over prior mortgages, as stated above. The court decided that the land grant was not entitled to such priority; or, in other words, that the first mortgage was a lien upon said rolling stock, and the first lien, but also held that if any of said rolling stock had been purchased by the bonds issued under subsequent mortgages, that such subsequent mortgage should have a preference of lien as to so much as could be shown to have been so purchased. To ascertain this fact, this part of the order of reference was made, the masters make their inquiry under this direction and for this purpose alone, report that forty box cars are included in the land-grant mortgage, "*the said cars having been purchased out of the proceeds of a portion of the bonds to which this mortgage is collateral.*"

They further report that all the rest of the rolling stock is

to pledge or mortgage their property as security. By the terms of the mortgage the rolling stock to be procured was pledged to secure the debt contracted for raising the means of its procurement. In equity, those pledges should be sustained, and the persons who purchased the company's bonds, and furnished the means for the procurement of the stock, should be protected. And they also furnished the means for building the road, from which revenues have been derived to enable the company to procure rolling stock. This matter is fully settled as authority to this court in the case of Pennock *vs.* Coe, 23 Howard, 117. The rolling stock was procured by the company, as owners, and adapted to the road as the means of operating; and so long as it is thus used, it should be considered as fixtures, even without statute law. The first mortgage covered all the after acquired rolling stock, except such as should be proven to have been purchased with funds raised upon subsequent mortgage; to that extent those mortgages should have a superior equity. For these reasons the exception will be overruled. But the decree will, in addition to the forty box cars reported by the masters, allow to this mortgage its share of the rolling stock purchased and procured by the receiver, costing $147,942, in proportion to the net revenues."

Record, 29.

It is evident, from an examination of these proceedings that the question there litigated was as to the *priority of lien*, and not as to whether the land-grant mortgage *was* a lien. The lien of that mortgage was not denied, but the sole question was as to its priority. This fact is evident from the whole proceedings in the case, and especially from the opinions delivered by the court below.

It has been argued and assumed that the court below found and adjudged this rolling stock, except forty box cars, to be a fixture to the eastern ninety-five miles of said road. Such is not the fact; but, on the contrary, the adjudication of the court is in direct conflict therewith. The order of reference directed the masters to report what rolling stock was covered by the first or Palmer mortgage, and what by the second or Bronson and Soutter mortgage. These two mortgages covered the same piece of road (the eastern ninety-five miles), consequently if the court found and adjudged this rolling stock

a fixture to said piece of road, it should be covered by both of these mortgages. The masters reported that this rolling stock was included in said first and second mortgages, but the court, on the exception of the complainants, modified said report by striking out so much thereof as found that this rolling stock was included in said second mortgage. This action is in irreconcilable conflict with the view of the case so often and earnestly advocated by Mr. Carpenter, and in order to save his theory he was forced to place the court below in the very ridiculous position of holding that this rolling stock was a fixture to said ninety-five miles of road, and yet that a mortgage on said ninety-five miles, and by its terms expressly including all said rolling stock, did not include any part of it. (See his briefs in ~~No. 279 of the term of 1861~~, page 18, ~~and also~~ in ~~original case No. 10 of the term of 1866, pages 20 and 21~~.)

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They further report that all the rest of the rolling stock is

included in the first and second mortgage, but the proofs taken by the masters did not show that any part of said rolling stock was purchased with bonds issued under said second mortgage. Consequently no part of said rolling stock was subject to the lien of said mortgage in preference to the lien of mortgages prior in date to it. Hence, the report was modified by the court in that particular so as to conform to the facts, and the report as confirmed by the court, found that the first mortgage was a lien upon all the rolling stock, and a first lien, except as to said forty box cars purchased with land-grant bonds as to which the lien of the land-grant mortgage had a preference to the first mortgage.

This construction is in harmony with the opinions of the court, the action in modifying said report, the subsequent action in the premises, and in accordance with the facts in the case, and the just rights of all concerned. The construction contended for by our opponents would give all the rolling stock ever purchased, at any time, to the east division, and forever exclude the balance of the road from it. This rolling stock was all procured by the La Crosse company for use on its road, and placed thereon. It was all procured subsequent to giving this first mortgage. The court decides that the first mortgage covers it all. The same principle and rule of decision would have given any amount of rolling stock so purchased to said first mortgage. This we can understand and assent to, but the coensel opposed insists that if included in the first mortgage it was a fixture to that part of the road and not to the other portion. This we deny, and insist that such a construction would of necessity make all the rolling stock which the company ever could purchase for its road, a fixture to the eastern division alone.

Immediately after this modification of the report, the final decree of foreclosure and sale was made, which is in the usual form, and purports to direct a sale of the mortgaged property, describing it as it is described in the mortgage, *verbatim*, and

following that description is a special description of the forty box cars, and the proportion of the rolling stock purchased by the receiver in these words:

"With forty box cars, numbered 330, 332, 334, 336, 338, 340, 342. 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406 and 408, and such portion or share of the rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to prior mortgages."

Exhibit to bill of complaint, p. 79 Record 279 of 1864.

A brief reference to the subsequent proceedings will show that both the counsel and court understood the decree as covering and including all the rolling stock, but that the lien of this mortgage, except as to the forty box cars and the portion of rolling stock belonging to the western division purchased by the receiver, was subject to prior mortgages. What were those proceedings?

In February, 1862, the marshal advertised the property for sale, and it was sold in October following. This sale was vacated by the complainants, and the premises were re-advertised in January, 1863, and finally sold on the 25th of April, 1863. These advertisements and reports of sale distinctly and explicitly set forth that this rolling stock was to be sold and was sold, subject to prior mortgages.

The marshal's advertisement of sale described the property to be sold in the words and figures following, to wit:

"All and singular the several tracts, pieces or parcels of land, which now or may hereafter be or constitute the site of the roadway, turnouts, engine houses, workshops, and other outbuildings, and all the other lands and real estate which now constitute or may hereafter constitute or be a part of the roads of said La Crosse and Milwaukee Railroad Company, from Madison, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from

Portage City to La Crosse; and also all and singular the superstructure of said roads, whether now made or to be made hereafter, and all the engine houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made, or to be built and made hereafter. And also all and singular the locomotive engines and other rolling stock, and all the other equipments, of every kind and description, which have already been or may hereafter be procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them.

"And also all and singular the rights, liberties, privileges and franchises of said La Crosse and Milwaukee Railroad Company, of every kind and description relating to said roads. Also all and singular the lands granted or intended to be granted to said railroad company, under and by virtue of an act of the Congress of the United States, entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June 3d, 1856,' and under or by virtue of an act of the Legislature of the State of Wisconsin, approved October 11th, A. D. 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company,' and to execute the trust created by an act of Congress, entitled 'An Act granting public lands to the State of Wisconsin, to aid in the construction of railroads in that State,' approved June 3d, 1856, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to St. Croix river or lake, estimated to be about one million of acres of land, together with all and singular the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate above mentioned and described:

"'The rolling stock hereinbefore mentioned is to be sold subject to the lien of mortgages executed prior to the 31st day of December, 1856, except forty box cars numbered 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 368, 369, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 406, 408; and except such proportion or share of said rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenue of the portion of railroad of the La Crosse and Milwaukee Railroad Company hereinbefore mentioned and described bears to the balance or other end of

said road since the appointment of the receiver, which said forty box cars and said proportion of rolling stock purchased by the receiver are to be sold free and clear of any incumbrance whatever.' "

The marshal's report of sale was equally clear and explicit, and describes the property sold, aside from the lands granted by Congress, in the words and figures following:

"And I then offered for sale and sold in like manner, the balance of the premises and property described in said decree, as follows, to wit: 'All and singular the several tracts, pieces or parcels of land which constitute the site of the roadways, turnouts, engine houses, workshops, depots and other buildings, and all the other lands and real estate which constitute part of the roads of said railroad company from Madison, by way of Portage City, to the St. Croix river or lake, between twenty-five and thirty-one, and from Portage City to La Crosse; and also all and singular the superstructure of said roads, and all the engine houses, workshops, depots and other buildings, and all the other improvements on or pertaining to said roads, and also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have been procured for or used on said roads, or either of them, and all the materials, tools, implements, utensils and other personal property, which have been procured for or used in connection with said roads, or either of them, and also all and singular the rights, liberties, privileges and franchises of said La Crosse and Milwaukee Railroad Company, of every kind and description, relating to said roads, (of said rolling stock forty box cars numbered respectively 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and such proportion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenue of the portion of the road covered by the aforesaid mortgage bears to the balance or other end of said road, was sold free and clear of all lien or incumbrance; but the remainder of the above mentioned rolling stock was sold subject to the lien of mortgages prior in date to the mortgage above mentioned, given by said La Crosse and Milwaukee Railroad Company,) together with the tolls, rents and income to be had or levied therefrom, and all corporate and other rights, franchises and privileges of the

said company, of, in and to, or concerning the same, being all the property, real or personal, described in the said mortgage (except the lands therein mentioned granted by Congress to the State of Wisconsin); and all and singular the privileges, hereditaments and appurtenances to the same belonging or in any wise appertaining, situate, lying and being in the State of Wisconsin, which was bid off by William Wallace Pratt and William H. White, for the sum of two million six hundred and seventy-five thousand dollars ($2,675,000), they being the highest and best bidders, and that being the highest and best bid made for the premises last above described.'"

Record, 470.

This report was excepted to by nearly all the defendants, and nearly one hundred pages of printed matter is occupied with these exceptions in the land-grant case. The exceptions were fully discussed, and the sale was confirmed by the District Court, and at the last term of the Circuit was re-confirmed, as made after a full hearing of all the parties in interest. The whole record clearly showing that the court below never doubted as to the effect of this decree, and that it included all the rolling stock of the company.

The description in the marshal's deed is equally clear, and is found at page 337 of Record.

The proceedings in the District Court after the sale, although invalid, yet are of importance as showing the understanding of the decree by the court that made it and by the purchasers at the sale, and are briefly referred to in that light.

Immediately after confirmation the purchaser applied for possession of the property so sold, which was resisted by the Minnesota company, and time asked to prepare a defense. Thereupon a temporary order was made, and time given said company to resist said application, at which time said company filed its answer, setting up, as it now claims, that only forty box cars were included in said decree, and that no other rolling stock except said forty box cars and the proportion of rolling stock purchased by the receiver passed by that sale, and, after hearing, an order was made putting the purchaser in possession of the property as sold, including the rolling stock in question. That order was as follows:

"In consideration of the said petition of the Milwaukee and St. Paul railway company, and of the arguments of counsel, it is ordered by the court that there be delivered over to the said Milwaukee and St. Paul railway company all and singular the railroad between the city of La Crosse and Portage City, its road-bed and track, with its depots, station houses, and all other property belonging to said railroad between the said points, and the forty box cars mentioned and described in the decree, and also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree; and also subject to other or previous liens or claims, the possession of the rolling stock on hand when the receiver took the same under the order of the court. And it is further ordered by the court that the said receiver be and hereby is discharged as such from the management and control of said western division of said railroad, under appointment in this case, subject, however, to the orders made in this case and in the other cases in which he was appointed, or may hereafter be appointed."

Record, 338, and pages 34 to 36.

This order is in perfect harmony with our theory of the whole case. It delivers to the St. Paul company the road-bed, forty box cars, and the proportion of rolling stock purchased by the receiver absolutely, and the other rolling stock that was on the road when the receiver took possession, "*subject to other or previous liens or claims.*"

The conclusions of the court, as stated 2 Wallace 640–41; "first, that the judge understood his decree and previous rulings as we (the court) have interpreted them; and, second, that he had no idea that he had confirmed a sale of all the rolling stock on the road, to the purchasers at the sale"—however legitimate as applied to the record then before the court, are wholly unsustained by the record now under consideration. For it now appears that the order of May 7th, 1863, was not intended as the final order on said application, but temporary, merely providing for the custody of the property during the time which was granted to the Minnesota company to prepare to answer and resist said application. (See order of May 7th attached to the bill as an exhibit, and pp. 34 to 36 of Record.)

Not only so, but Col. Crocker testifies that no possession of any part of the road or rolling stock was ever given to the St. Paul company under the order of May 7th, but that he remained in possession of the whole road, and all the rolling stock, until June 12th, 1863.

Record, 599 and 600.

It should be borne in mind, also, that this order of June 12th did not transfer to the St. Paul company all the rolling stock on said road; it left in the receiver's hands over $200,000 worth, being the proportion of that purchased by the receiver belonging to the eastern division.

We therefore insist that the true construction of said decree is that it covered and included all the rolling stock on said road at the time the receiver took possession, and that the whole thereof was rightfully sold by the marshal.

III.

The supplemental mortgage given by the La Crosse company to Bronson, Soutter and Knapp in pursuance of the covenants for further assurance in the land-grant mortgage, covered and included all of this rolling stock; and if the court is of the opinion that we are mistaken in the views above expressed as to the effect of the land-grant mortgage and decree, then we insist that we are entitled to have said supplemental mortgage foreclosed, and the property therein described subjected to the payment of the balance due on the land-grant decree, and that our cross bill is the appropriate proceeding for that purpose.

1st. This mortgage was given September 4th, 1857, and at that time the La Crosse company had purchased and placed upon its road all, or nearly all, the rolling stock of which the receiver took possession on the 11th day of June. 1860. (See testimony of Goodrich and Palmer above.)

2d. Said supplemental mortgage conveyed, among other things, "all and singular the locomotives, cars, engines, tools, materials, lumber, office furniture, and personal property of every description belonging to the said company, wherever the same may (might) be.

Record, 57.

There is no pretence but that this mortgage covered and conveyed all the rolling stock which the company then owned. Language could not well be more explicit for that purpose.

It is, therefore, established, that at the date of the execution of this mortgage, the La Crosse company was the owner of the rolling stock in question, and that it was conveyed by this mortgage to Bronson, Soutter and Knapp, trustees.

Now, for the argument, granting the proposition contended for by our opponents, that this rolling stock was not included in the land-grant mortgage or sold under the decree in that case, it follows necessarily that this was a mortgage of a separate piece of property, not included in the original mortgage to secure the same debt, and therefore that the trustees were authorized to foreclose the same and subject it to the payment of the original debt, and for that purpose might properly invoke the aid of a court of chancery. The same powers are conferred upon said trustees in relation to this mortgage and property, that was given in the original land-grant mortgage. The same power to take possession and sell are also conferred; but we are not proceeding under that power, but are asking the aid of a court of equity to enforce our lien, which right is entirely independent of the authority conferred by the power of sale, and is not embarrassed by or subject to the restrictions attached to the exercise of that power. On their theory,

it is simply the case of a creditor, having one debt and two separate and distinct mortgages on separate properties to secure it. He has foreclosed one of his mortgages on one of the properties made a part of his debt, and now asks the aid of this court to collect the balance of his debt by a foreclosure of the other mortgage. This practice is regular in such a case, and the only proper practice. Uniting the two securities in one suit, would be liable to objection for multifariousness. We are therefore entitled to have this mortgage foreclosed, and subject the property to the payment of the balance due on the land-grant decree, on our opponent's theory of this case. Our cross-bill is the proper proceeding for that purpose.

Bronson, Soutter and Knapp had procured a decree of foreclosure and sale on the land-grant mortgage, which they had executed by a sale, and the purchasers claimed, and said trustees were advised, that said sale carried the rolling stock in question, and in pursuance of said sale said rolling stock had been delivered to said purchaser, who was in possession thereof. Subsequently, and on the 10th day of August, 1864, the Minnesota company filed a bill of complaint supplemental to said foreclosure suit, against Soutter and Knapp, survivors, &c., as trustees, and against the purchasers at said sale and their vendee, the St. Paul company, setting forth the proceedings in the foreclosure suit, that the purchasers at said foreclosure had got possession of said rolling stock, and that the defendants claimed that said purchasers had acquired the title thereto by said foreclosure sale, which said supplemental bill denied, and claimed that said Minnesota company was the owner thereof, and asked the court to decree it (the Minnesota company) the owner thereof in fee and entitled to the possession and an account for its use. This bill was answered by the defendants, and leave given to said Soutter and Knapp to file this cross-bill setting up their right to said property.

We submit that the cross-bill was properly filed.

The actual possession of the property had passed to the purchaser at the foreclosure sale, under claim of title, and the Minnesota company then impleads these trustees and the purchaser asking a decree of the court declaring its title thereto. Under those circumstances the trustees were as much bound to set up their title under this supplemental mortgage, as the purchaser was to set up his claims, and had either of them failed to do so, and a decree passed in favor of the complainant, declaring the Minnesota company the owner of the property, both of them would have been barred and foreclosed from asserting any right or interest therein forever afterwards. The right to and ownership of said rolling stock was directly in issue between the Minnesota company on the one side and the said trustees and said purchaser on the other, by said supplemental bill. It was therefore necessary for the trustees to make defence and set up their rights to the property, both under the original mortgage and foreclosure proceedings and also under this supplemental mortgage. This would be the duty of the trustees in any event. Whether this supplemental mortgage is to be regarded as given to perfect a grant already made by the original land-grant mortgage, or as an additional grant of property not included in the mortgage. In either case, also, the cross-bill to foreclose any rights which the Minnesota company had or pretended to have, was proper. The Minnesota company's bill was substantially a bill to declare invalid any right or claim which the trustees or the purchaser had to said rolling stock, and to have its own title confirmed. It was a suit to set aside, cancel or annul a mortgage and title made under it, and the cross-bill was to enforce and foreclose said mortgage, which is the common and usual course of chancery proceeding in such cases.

The original or supplemental bill of the Minnesota company is brought against Soutter and Knapp, survivors, and the St. Paul company, asking to be adjudged the owner of this rolling stock, as against the defendants, to have defend-

ants enjoined from interfering with it, and for compensation for its use. The defendants set up this right under the land-grant mortgage, and in addition set up the supplemental mortgage to secure the same debt for which the land-grant mortgage was given, specially mortgaging this particular rolling stock, and showing that a large part of that debt is due and unpaid, and that the St. Paul company is the *cestui que trust* of said Soutter and Knapp, survivors, &c., and claiming said property as mortgagees in possession, if not the absolute owners thereof, the cross-bill asks for affirmative relief in the premises, that said mortgage may be foreclosed.

This cross-bill, therefore, relates exclusively to the subject matter of the bill and things connected therewith. It is a matter of defence, and asks for affirmative relief of an equitable nature. It embraces no new or distinct matter not embraced in the original bill.

2 Barbour's Ch'y Practice, 130 and 132.
Story's Equity Pleadings, § 391 *et seq.*
Germand vs. Mackin, 6 Page, 288.
2 Daniels' Ch'y Practice, 1747.

A cross-bill is a mode of defence, and is dependent on the original bill, forming with it but one suit, and, although its allegations must relate to the subject matter, it is not restricted to the issues of the original bill.

Nelson & Hatch vs. Dunn *et al*, 15 Alabama, 507.

On a bill filed to foreclose a prior mortgage, a cross-bill setting up that said mortgage had been paid or canceled, and asking to have a subsequent mortgage on the same property foreclosed, was sustained.

Whitbeck vs. Edgar, &c., 4 Sanford's Chancery, 427.
Same case, 3 Barbour's Ch'y, 106.

In this case, the foreclosure of the supplemental mortgage is a subject of equitable cognizance, and the bill contained all the statements necessary for an original bill of foreclosure, and if we were wrong in calling and treating it as a cross-bill, it

should have been sustained as an orlginal bill of foreclosure, and a decree for a sale of the mortgaged property made thereon.

Pollock & Pollock vs. The National Bank *et al*, 7 New York, 274.

IV.

The demurrer to the second supplemental bill should be sustained.

1st. Because it is not matter properly supplemental to the original bill or the first supplemental bill.

2d. Because the Court had not jurisdiction of the matters therein stated between said parties.

3d. Because there is no equity in it, regarded either as an original or supplemental bill.

1st. It is not matter supplemental to the first supplemental bill. Nothing has transpired to call for this second supplemental bill since the filing of the first, except so far as it relates to the use of the rolling stock.

So far as this second supplemental bill sets up a right to use the entire road from Milwaukee to La Crosse, it is in direct conflict with the first supplemental bill, and a complete change of base. The first bill proceeds upon the theory that the road is divisible and the rolling stock separable from the west end, and seeks a decision giving the rolling stock to the east division. The second supplemental bill claims that the road is indivisible, and that the road and rolling stock must be used together on the whole length of the line from Milwaukee to La Crosse, and that no portion of the business of one division can be diverted from the other by connection with another road, but that the road must be operated as an entirety from Milwaukee to La Crosse, notwithstanding the foreclosure sale.

The two bills are filed by the same party, are to be heard as one suit, and the one directly annuls and contradicts the other.

2d. This is a controversy, so far as the operation of this road is concerned, between the Minnesota company on one side and the St. Paul company on the other, under the laws of Wisconsin. There is, therefore, no element in it, to give the Federal Courts jurisdiction. It is a contest between two corporations of the State of Wisconsin, arising under the laws of that State, and must be settled by the State courts. This Court has no jurisdiction in the matter.

3d. This second supplemental bill is without equity to sustain it. Admitting all the facts alleged in the bill, the laws of Wisconsin in force when the land-grant mortgage was executed and ever since, expressly authorize the division of an entire road by sale on a mortgage. The General Laws of the State of Wisconsin passed in 1856 (General Laws of Wis., pages 213–16) expressly authorized said La Crosse company to mortgage the whole, or any portion of its railroad, and expressly authorized a sale on such mortgage of the whole or any portion of the road, and provided that the purchasers at such sale should have, exercise and enjoy thereafter all and the same rights, privileges, grants, franchises, immunities and advantages in such mortgage enumerated and conveyed, which belonged to or were enjoyed by the company making such mortgage, so far as the same relate or appertain to that portion of said road so mortgaged. And such purchasers were authorized to organize as a company, and manage and operate said road or portion of road as their own absolute property. This law has since been incorporated into the Revised Statutes, page 510, § 33, and is now the law of the State.

This act fully authorized the severance of an entire railroad, its franchises and appurtenances, by means of such mortgage sale. Consequently, the purchasers at said land-grant sale and their assigns thereby became the absolute owners of said

western division of said La Crosse railroad, and entitled to hold, use, own and operate the same as an independent railroad, free and discharged from all control or connection with the eastern division thereof.

See also Chapter 78 of Private and Local Laws of Wisconsin for 1856, page 129. See also Chapter 517, of same volume, page 1133; also General Laws of Wisconsin for 1856, page 217.

The cases numbered on the present calendar as Nos. 43, 62, 161, 172, 173 and 230, and next following in this brief, are all appeals from decretal orders entered in the case of Soutter, survivor, &c., and may properly be considered in connection with this case.

Nos. 43 and 161 are decrees for the use of rolling stock, No. 62 relates to its possession, and Nos. 172, 173 and 230 are appeals from the orders of sale.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 43 of this Term, which was Argued as No. 182 of the last Term, and not yet Decided.

This is an appeal of the Milwaukee and St. Paul railway company from a decretal order made by the circuit court for the district of Wisconsin, on the 18th day of July, 1865, in the case of Soutter *vs.* La Crosse railroad company, which suit was brought in 1859, to foreclose the *second* mortgage, so-called, on the eastern division of the La Crosse and Milwaukee railroad. This cause was first before this court as Record 198, of December term, 1862, and was heard on the merits as No. 132 of December term, 1863, and is reported in 2 Wallace, 283. The same cause was again before the court on a supplemental record, December term, 1864, No. 280 of that term, and is reported in 2 Wallace, 510.

This decretal order directs the Milwaukee and St. Paul Railway Company to pay to the receiver $237,338.78, of which amount $209,840.94 was for the use of the rolling stock now in dispute, from June 12th, 1863, to the 28th day of February, 1865, and the remaining 27,497.84 was for moneys expended by the receiver in erecting new buildings on said east division, and was not allowed by the court in settling the receiver's account, and should the court arrive at the conclusion, in Nos. 218 and 219, that the whole of the rolling stock

on the La Crosse road of which the receiver took possession on the 11th of June, 1860, was covered by the land-grant mortgage, and passed to the purchaser at the sale on that mortgage, subject to prior liens, it will not be necessary to examine Nos. 43, 62 and 161 (excepting the one item of $27,497.84 in No. 43), as all of said cases on the merits depend upon that question, and in that case must be reversed; while on the other hand, should the court be of the opinion that only forty box cars were covered by said mortgages and passed to the purchaser at the land-grant sale, it will then be necessary to examine the other points raised in said cases.

Hans Crocker was appointed receiver under the land-grant mortgage May 18th, 1860.

Record, 242.

In January, 1860, Sebre Howard filed a creditor's bill on a judgment against the La Crosse railroad company and others, in the same court, and such proceedings were therein had, that said Hans Crocker was in that suit appointed receiver of the La Crosse railroad, its appurtenances and rolling stock, on the 9th day of June, 1860, subject, however, to his former appointment in the suit of Bronson, Soutter and Knapp. On the same day his bond was approved and filed, and on the 11th of June, 1860, he took possession of the whole of said railroad, its appurtenances and rolling stock, as such receiver under his aforesaid appointments, and from that time continued to operate said road as such receiver. (Record, 295.) Afterward, and on the 6th of July, 1860, he was appointed receiver in this case. No additional bond was ever given on his appointment in this case, but his monthly reports of receipts and disbursements were filed in all these cases. [See Record No. 198, December term, 1862, p. 57.]

After the sale on the land-grant mortgage and delivery to the purchaser—the appellant—of the road and rolling stock purchased under that sale, as stated above, the rolling stock left on the balance of the line was not sufficient to operate it

properly. Therefore the Circuit Court deemed it advisable that the order appointing the receiver should be so modified as to allow the appellant to operate the eastern division in connection with the western, under the general supervision of the receiver, and account to him for the proceeds, and thereupon made an order in the said case of Sebre Howard, which was then pending in the Circuit Court, as follows:

June 12th, 1863.—A petition in writing of the Milwaukee and St. Paul railway company having been presented to the court, and filed in the case of Greene C. Bronson, James T. Soutter and Shepherd Knapp, against the La Crosse and Milwaukee railroad company and others, setting forth in substance that, in pursuance of a decree of this court in that case, the western division of the La Crosse and Milwaukee railroad, between La Crosse and Portage City, has been sold, and that said sale was confirmed and perfected; and that said Milwaukee and St. Paul railway company is a corporation organized under the laws of the state, as grantees under said sale, and praying to be allowed to operate the whole line of road between La Crosse and Milwaukee as a continuous road, as directed and authorized by the act incorporating the La Crosse and Milwaukee railroad company; and the same petition having been argued by Messrs. Cary and Lynde in support thereof, and by Messrs. Hubbell and Carpenter on behalf of Charles Howard, a judgment creditor of the La Crosse and Milwaukee railroad company, who is prosecuting a judgment creditor's bill, and of the Milwaukee and Minnesota railroad company in opposition thereto; and the court being satisfied that the policy of the state and the interests of the public, and of the creditors of the La Crosse and Milwaukee railroad company, require that the court should not continue further to operate, by its receiver, any part of the said railroad between La Crosse and Milwaukee, but that the whole line of said road should be operated, without interruption or embarrassment, by a responsible corporation; and the court being satisfied that its possession and control, by a receiver, of the eastern division, between Portage City and Milwaukee, might affect the rights of the public, and embarrass the free and proper operation of the whole road, as required by the original grant or charter, and also prejudice the interests of creditors of the La Crosse and Milwaukee

railroad company; and it being represented to the court that persons interested in the Milwaukee and St. Paul railroad company own or control bonds included in the mortgage to these complainants, and the subject of this suit, to the amount of four hundred and seventy-eight thousand dollars, being nearly one-half of the whole amount of said mortgage.

"It is thereupon ordered by the court that the order appointing a receiver in the case be modified in the manner following, subject to any further or other order rescinding, altering or modifying this order now here made, that the receiver let the said Milwaukee and St. Paul railway company into the possession of the eastern division of the La Crosse and Milwaukee railroad, from Portage City to Milwaukee, with the appurtenances and property and rolling stock thereto belonging; and that the said Milwaukee and St. Paul railway company, subject to the further order or orders of the said court, operate said eastern division of said railroad in connection with the said western division thereof, so that one continuous line of railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee railroad company, without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company, in pursuance of said charter, and not otherwise.

"And it is further ordered by the court that the said Milwaukee and St. Paul railway company shall at all times allow and permit the receiver, or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts proceedings, receipts and revenues, and also of the transactions, of the said Milwaukee and St. Paul railway company, and of its board of directors, in relation to the business and operation of the whole line of road; and that the said railway company shall, out of the revenues of said road, keep the said eastern division and all the rolling stock in good order, and defray all running and other necessary expenses, and at the end of every month deliver to the said receiver, or such other person as may be appointed, a full and detailed account of all revenues arising on the whole road, and of all necessary disbursements out of the same, and pay over monthly to the receiver the proportion of the said eastern division of the net revenues of the said railroad; and that the said

receiver make monthly returns, as heretofore, of his accounts into court, and disburse the moneys by him received from time to time in the payments of liens and debts of the said La Crosse and Milwaukee railroad company, according to their priorities and equities.

"And it is further ordered by the court that before the said Milwaukee and St. Paul railway company be permitted to have possession under this order, the said company, by its constituted officers, shall enter into bond to the United States, for the use and benefit of all interested, with sureties to be approved by the court, in the penalty of one hundred thousand dollars, conditioned that the said company will faithfully comply with this order of court this day made, and any subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee, and will keep said road, and the rolling stock and property, in good order, and shall manage and conduct the same to the best advantage of the public and the creditors of the La Crosse and Milwaukee railroad company, and shall make monthly returns and pay over the net revenues of this road according to this order."

The same order was also entered in this cause in the District Court, where it was supposed this cause was then pending, but which was afterwards declared void by this Court, for the reason that this cause was then in the Circuit Court.

Under the order made in the Howard case, the receiver surrendered to the appellant the said eastern division of said road, with the proportion of rolling stock purchased by the receiver. And the appellant, under said order, operated said road until the 28th day of April, 1864, when said order so made in the Howard case and the one attempted to be made in this case were rescinded by the Circuit Court. [Record, 124 and 125. See also Record No. 280, of December Term, 1864, p. 66.]

On the 26th of May, 1862, one Bouton filed a bill against the Minnesota company, and such proceedings were had that Hans Crocker was appointed receiver in that suit by the Circuit Court, October 8, 1862. [Record, 449–481.] The same order of June 12, 1863, was entered therein, and was rescinded

April 28, 1864. [Record, 489 and 491.] And thereupon the appellant surrendered said eastern division and the rolling stock received with it to the receiver the last day of April, 1864.

Record, 124 and 125.

On the same day the receiver agreed with the appellant to operate said eastern division in connection with the road of the appellant, under the management of the general manager of the appellant, each portion paying its own expenses; the general expenses of management being paid *pro rata* per mile, in proportion to the whole road operated, the local business of each road being credited to each road respectively, and the through business being divided *pro rata* per mile.

Record, 125, the receiver says:

"About the 1st of May, when I took possession of the eastern division of the road, I found, that under the order of the court and the claim of the St. Paul company, the rolling stock of the eastern division would not be sufficient to operate that division. It would have been necessary for me to open a new set of books and employ a new set of officers, had I determined to run the eastern division independent of the western division. I therefore told Mr. Goodrich that I wanted him to operate the eastern division of the road for me, to retain the necessary officers, or to consider them in my employment jointly with the St. Paul road, and to keep the accounts as they had been kept by the St. Paul company for the year previous, showing the proportion of earnings applicable to each division. I consider that arrangement the best arrangement for the eastern division."

The appellant was not a party to this foreclosure suit, and never has been, or had any *status in or connection with it*, except under the order modifying the appointment of the receiver, made June 12, 1863, in the Howard and Bouton cases and this case above quoted. This appellant was in possession and operated said eastern division from and after June 12, 1863, to May 1, 1864, accounting to the receiver for its earnings and disbursements, when it was again restored to the

receiver, and from that time operated by him and under his direction and control.

On the 28th day of April, 1864, the Circuit Court made an order in the case of Bronson and Soutter, as follows:

"Ordered by the court, that the receiver file in this court a continuous monthly account of his receipts and disbursements as receiver from the time of his appointment, including the receipts and disbursements of the Milwaukee and St. Paul Railway Company from the 12th day of June, 1863, by the 1st day of June next, and that any person interested may examine the same and file exceptions thereto; and that H. L. Palmer, Esq., be and is appointed an auditor to report on the same to the next term of this court."

Record, No. 280, of December Term, 1864, p. 67.

On the first day of June, 1864, Hans Crocker, the receiver, filed said account, which is found at length in the Record last quoted, from page 67 to 89. Alexander Fleming and the Minnesota company filed exceptions thereto.

Same Record, pages 90 to 94.

On the 8th day of October, 1864, the following order was entered in this cause, to wit:

"It is ordered by the court now here, that the order made in this cause on the 28th day of April, A. D. 1864, requiring the receiver to render account, and referring it to H. L. Palmer, auditor, to report on the same the present term of this court, be and the same is hereby modified as follows:

"Ordered, that Hans Crocker, receiver, file in the office of the clerk of this court, on or before the 20th day of November next, a detailed account of his receipts and disbursements as receiver, from the first day of June to the 31st day of October, 1864, inclusive; that any of the parties to this cause may within ten days after such account shall be filed, file exceptions thereto; that such account and the exceptions thereto be referred to the auditor appointed in the said order of the 28th day of April, 1864, to examine and report thereon in like manner as upon the account and exceptions referred by said former order; that the auditor ascertain and report what should be charged for the use of rolling stock formerly on said railroad, as a part of the accounts reported by him; that the auditor ascertain and report what sum should be allowed to the receiver for his services and expenses as receiver, and whether the receiver is subject to any, and what, contingent

liabilities growing out of his receivership, and the amount and nature of each, and that said auditor report thereon with all convenient speed, and by the first Monday of March, 1865; that the receiver also file with the clerk of this court, on or before the 20th day of March, 1865, an account of his receipts and disbursements as receiver from the first day of October, 1864, to the last day of February, 1865, both inclusive; that any of the parties to this suit may, within five days after such accounts shall be filed, file exceptions thereto, and that such last-mentioned accounts and exceptions thereto be referred to H. L. Palmer, auditor, appointed aforesaid, to examine and report thereon by the first day of the next April term of this court."

Record, pp. 1 and 2.

Afterwards, on the 28th day of October, 1864, Hans Crockr filed statements of the earnings and expenditures of the eastern division of the La Crosse and Milwaukee Railroad for the months of March, April, May, June, July, August, and September, 1864.

Record, No. 280, of Dec. Term, 1864, pp. 265 and 273.

On the 17th of April, 1865, an order was entered in this cause as follows, to wit:

"It is ordered by the court, that the order in this cause heretofore made, referring certain matters to H. L. Palmer, Esq., be so modified that the said Palmer make report thereto on or before the first day of June next; that any of the parties interested may except to said reports or either of them within fifteen days thereafter; and said report and exceptions shall stand for hearing at the first sitting day of this court thereafter, or as soon thereafter as counsel can be heard; and that the testimony before said Palmer shall be closed by the 10th day of May next."

Record, p. 38.

The hearing before the auditor commenced July 30, in 1864 [Record, 82], and finally closed in June, 1865. [Record, 492 and 493.] His report was filed June 28, 1865, [Record, 43], and is found on page 69 of Record.

The report first disposes of that portion of the receiver's account relating to his receipts and expenditures, from the time of his appointment to June 13, 1863, and from July 1,

1864, to February 28, 1865, and is found on pages 69 to 75 of the Record. With this part of the report the appellant has no concern. The receiver's account from June 12, 1863, to July 1, 1864, is considered separately from the balance of the account, and is treated by the auditor as the account of the appellant with the receiver.

After the accounts of the receiver were filed in continuous monthly statements, as required by the orders of the court, and the Minnesota company had filed its exceptions thereto, the auditor commenced the examination of the receiver on the 8th day of August, 1864. [Record, 119.] The counsel for the Minnesota company then requested the receiver to present statements showing the amount received and disbursed on each division of the road, from June 11, 1860, the time when the receiver was first appointed, to June, 1864, according to a certain basis or manner of division adopted by the receiver. [Record, 120 and 121.] And therefore the further hearing of the matter was adjourned from August 8 to August 19, 1864, to enable the receiver to prepare such statements, which were marked respectively C, D and E. (Record, 121 and 122.] These exhibits are attached to the auditor's report, and are found on pages 174 to 177 of Record. Afterwards a "*continuation of exhibit E*" was filed, containing the account in the same manner down to the 28th day of February, 1865.

The auditor in his report disposes of C, D, and the continuation of E, as accounts of the receiver, but treats E as an account of the appellant. From the time of the sale of the western division on the land-grant decree, the purchasers at that sale had claimed all the rolling stock on the road when the receiver took possession thereof, and their proportion of that purchase by the receiver. And from that time until September 1, 1864, the eastern division had been credited with the use of its rolling stock on the western division, and charged with the use of appellant's stock on the east division, as will appear from an examination of said exhibit E.

The auditor, however, under the decision of this court on the demurrer in the supplemental bill case reported in 2 Wallace, 609, and the decision of the circuit court, held that the appellant was only entitled to forty box cars and the proportion of rolling stock purchased by the receiver, and reported the appellant should be charged with the use of rolling stock upon this basis, and thereupon said auditor reported for use of rolling stock against this appellant, $123,374.40. (Record, 78 and 81.) And afterward, on a further exception by the Minnesota company, reported that he had made a mistake, and reported the further sum of $86,466.54, making in all the sum of $209,840.94, and then reported in favor of allowing the balance of the account as made.

Alexander Fleming and the Minnesota company filed several exceptions to the report of said auditor, and their eighth exception objected to the allowance of item 28 of exhibit E, for new buildings erected (Record, 501), which exception was sustained and said item disallowed. The appellant excepted to said report in reference to the matter of rolling stock, and the charges and credit for the use thereof. [Record, 505.] And after hearing said exceptions, the said circuit court overruled the same, and thereupon made its decretal order as follows, to wit:

"And the court, correcting the auditor's report in the particulars above mentioned, finds that there is now in the hands of the Milwaukee and St. Paul railway company, as money due and payable to Hans Crocker, as receiver of the eastern division of the La Crosse and Milwaukee railroad, the sum of [364,188.58-100 dollars] three hundred and sixty-four thousand one hundred and eighty-eight and 58-100 dollars.

"And it appearing to the court that the cash balance due to said receiver is the sum of $12,681.69, and that there is due to the complainant for the expenses of this suit the sum of $35,796.34, together making the sum of $48,478.03, now, upon consideration, this court doth order that the Milwaukee and St. Paul railway company, on or before the 1st day of September, 1865, do pay in cash to said receiver the sum of $12,681.69, and in cash to said receiver for said James T. Soutter, trustee, by the same day, the sum of $35,796.34, and that upon mak-

ing said payment of $48,478.03, the same be credited upon said indebtedness of $364,188.58.

"And it is further ordered that the said Milwaukee and St. Paul railway company, on or before the first day of September, 1865, pay to Hans Crocker, receiver, the further sum of three hundred and fifteen thousand seven hundred and ten dollars and fifty-three cents; and that in making said last payment, if made by the 1st of September, 1865, said Milwaukee and St. Paul railway company may pay to the receiver in past-due coupons for interest on the bonds secured by the mortgage in this cause, in such amounts as the holders of such coupons would be entitled to on their said coupons if the whole amount thereof was paid in cash."

Record, 551.

The appellant prayed an appeal from so much of said order as charged said appellant, $209,849.94 for use of rolling stock, and the said sum of $27,497.84, the amount expended in erecting new buildings on the said eastern division, together amounting to $237,338.78.

I.

The main question, on this appeal, is as to the ownership of the rolling stock by the appellant, by virtue of its purchase under the land grant mortgage. We insist the appellant became such owner by that purchase, and for that reason the order must be renewed as to the sum of $209,840.94, for use of said stock. This question has been already fully considered in Nos. 218 and 219, pages above, and need not be repeated here.

II.

The Circuit Court had not jurisdiction of the appellant, so as to authorize it to make the decretal order from which the appeal in No. 43 is taken. And for that reason it should be reversed.

Judgments or decrees can only be entered against parties to the suit, and it therefore becomes necessary to inquire whether the appellant was such party at the time of making the decretal order.

This suit was commenced December 9, 1859. The appellant was not organized until May 5, 1863, consequently it could not have been a party thereto, previous to that time. Has it since become such party, and when, and how?

On the 28th day of April, 1864, the day on which the order was made requiring the receiver to account, his honor Justice Miller delivered and filed an opinion in this cause, and in the case of Howard in the Circuit Court, in which he said:

"The Milwaukee and St. Paul Railway Company is an organization created since this litigation commenced. It is no party to either of the suits named."

This statement was true then, and it is true to-day. No step known to the law has been taken to make the appellant a party to this suit. The order of June 12, 1863, in this cause had no such effect, and could not have had such effect had it been a valid order; but this court has already pronounced that order void, for want of jurisdiction; consequently it could have no effect to make the appellant a party here.

Bronson vs. Railroad, 1 Wallace, 405.

The same order was on the same day entered in other cases, where the court had jurisdiction, but that did not make the appellant a party or a receiver in this cause.

It might have subjected the appellant to the order of the court in the Howard case, in which it was entered, to answer for what was done under that order; but could it have any such effect or give the court any such power in this case? There was never any order in this case in any manner connecting the appellant therewith, and consequently the appellant was not answerable to the orders of this court in this case until some proceedings had been taken to give the court jurisdiction of its person.

No such steps were taken in this cause. The appellant was not treated as a receiver or *quasi* receiver in these proceedings. No order was ever made for the appellant to account. and no account was ever filed by the appellant. The order of April 28, 1864, as we have seen above, entirely ignores the appellant as a party or a receiver, but directed the receiver to file his accounts, "*including the receipts and disbursements of the Milwaukee and St. Paul company from the 12th of June*, 1863." The subsequent order of October 8, 1864, directs "*Hans Crocker, receiver*, to file, &c." The accounts of Hans Crocker, receiver, which were filed, did include all moneys received or disbursed by himself or by said appellant. We therefore submit that it was not competent for the Circuit Court, on these proceedings, to enter a judgment or decretal order, for the payment of money, against the appellant, and that such proceeding was without jurisdiction.

After the auditor had made his report, charging the appellant, exceptions thereto were filed, but that did not give the court jurisdiction of the person of the appellant, for the purpose of making the decree. The fact that the appellant objected to the unauthorized report of the auditor, could not give jurisdiction to enter such decree. That would be holding that because the appellant objected to an unauthorized proceeding, therefore, it became legal and proper.

It was competent for the Circuit Court to order the receiver to file his account in this cause, and perhaps direct him to include in that account the receipts and disbursements of the appellant from June 12, to May 1, 1864, but of this I am not certain. But having made such an order, the St. Paul company were justified in watching the proceedings before the auditor so far as it related to that part of the account, but it was not a party thereto or to the record in this cause, and no order could be made against it in that proceeding.

III.

Admitting, however, that the appellant is to be treated as a receiver in this cause, and that these proceedings were a requirement upon it to account as such receiver, still the decree is erroneous, and must be reversed so far as the appellant has appealed therefrom.

First. Because as such receiver, the appellant would only be required to account for what it received as such receiver and its proceeds. As such receiver, it only received what was given by the order of June 12, 1863, in the Howard case. All that was transferred to the appellant or received by it under that order, was that part or portion of the La Crosse railroad, its appurtenances, and rolling stock, which was not delivered to it under the order of the same date made in the land-grant cause; for whatever was given by the order in the land-grant foreclosure case, was given to the appellant as purchaser and owner, and not as receiver. The western one hundred and five miles of the road, the proportion of rolling stock purchased by the receiver belonging to said one hundred and five miles, and all the rolling stock that was on the whole road, when the receiver took possession, June 11, 1860, were given in express terms to the appellant by said order of June 12, 1863, in the land-grant case; so much, it took as owner, and that left subject to the order in the Howard case, the eastern ninety-five miles, and the proportion of rolling stock purchased by the receiver belonging to said ninety-five miles. This the appellant took, as *quasi* receiver, or under the receiver, and for it and its proceeds, either the receiver or the appellant should account when properly required. This was fully accounted for in the accounts of the receiver, Hans Crocker, Exhibit "E," [Record, 176.] But the auditor, in addition, reported that the appellant should also account for the use of all the rolling stock that was on the whole road, except forty box cars, when the receiver took possession, June 11, 1860, and on that hypothesis charged the appellant on that account, $209,840.94.

The auditor reports, "that the order in the case of Bronson, Soutter and Knapp, vs. The La Crosse and Milwaukee Railroad Company and others, made on the 12th day of June, A. D. 1863, still remains in full force, and not reversed or rescinded. *The rolling stock remained in the possession of the Milwaukee and St. Paul company by virtue of this order.*"

Record, 73.

Notwithstanding, however, the auditor reports that under the decision of this court and the district and circuit courts, he must find that said rolling stock belonged to the eastern division; and thereupon charged the appellant with the value of its use. This is clearly erroneous. He finds it was delivered to us under our purchase in the land grant case, and so remained in our possession, and consequently, that it was not in the custody or control of the receiver, or in the custody or care of the court, but in the possession of the appellant as purchaser. Hence neither the receiver nor the court could have any control over it. It had been given to the appellant as purchaser, and as to that the receiver was discharged. It was not in the power of the court to again take possession of said property without some new proceeding whereby the appellant would be made a party and have an opportunity to be heard. The property was no longer in the custody of the court; and, whether rightly or erroneously discharged out of the custody of the court, it could not be reclaimed in this way. The auditor might, with just as much propriety and equal legality, have charged the receiver with the value of the use of the forty box cars, or the whole western division. It was all in the hands of the receiver on the 12th of June, 1863, and all passed out of his hands and the control of the court at the same time and in the same right, and if the auditor, or the court confirming his report, had the right to disregard said appellant's rights as to a part of the property, they had the same right as to all. The property, when once discharged from the custody of the receiver, could not be again returned

to his custody except by an original application for the appointment of a receiver, and the person having the possession of the property must have been made a party to the proceeding and had an opportunity to be heard.

The appellant claims as purchaser, and in that character received said property, and its rights in that respect could not be disregarded or adjudged, in a proceeding to which it was not a party. The appellant's rights could not be thus disposed of in a sort of side-bar proceeding.

It is therefore insisted that the said item of $209,840.94 for use of this rolling stock was improperly charged the appellant, even if the appellant can be held as a receiver in this cause and liable to account on these orders for what it receives as receiver.

Second. The decree is erroneous in that it sustained the eighth exception of the Minnesota company, and disallowed item 28 of Exhibit "E" for amount expended in the erection of new buildings, amounting to $27,497.84.

This item was for new buildings erected at different points by the receiver on the depot grounds in Milwaukee, and along the line of the eastern division, and were permanent structures.

The auditor's report of this item is found on page 76 of Record, and is as follows, to wit: "The item No. 28, contained on the credit side of the account, exhibit E, new buildings, $27,497.84, is also specially excepted to by the Milwaukee and Minnesota railroad company, in and by exhibit KKK. I have ascertained and report that this sum was expended for the erection of new buildings on the machine-shop grounds in Milwaukee, extension of depot buildings, erection of water-houses, and other improvements on the eastern division; that all these erections were not necessary for the eastern division, operated as a road commencing at Milwaekee and terminating at Portage city, and not forming a part of a through route to the Mississippi river; that these improve-

ments were projected and commenced, and the expenditure mainly made, whilst the two divisions of the road were operated together as one through line, and before the opening of another route from Portage City to Milwaukee was contemplated, and that as the said railroad from Milwaukee to Portage City was then circumstanced these buildings and improvements were necessary to its proper and profitable operation, and the expenditure was properly and prudently made. I therefore audit and allow this credit, amounting to said sum of $27,497.84."

This report was fully sustained by the facts as proved in the record; the court, however, held that it must be disallowed, inasmuch as no special order of the court was obtained for the expenditure before it was made.

The property in the hands of the receiver in this case was a railroad, imperfectly constructed, not owning its right of way, without fencing, depot grounds, or suitable buildings for the transaction of its business, when the receiver took possession; and, in order to keep it in operation and render it safe for the public, it was necessary that the receiver, while in the possession, should keep it in repair and make all proper necessary improvements; otherwise it would soon become useless as a source of profit or income, and dangerous to the public.

The order appointing the receiver in the Howard case is found on pages 295 and 296 of Record, and provides for the receiver taking possession of the property, operating the road, and receiving the income; and then provides that "out of the said income he shall pay the expenses of the said receivership, and the costs and expenses of operating and maintaining, or preserving and keeping, said railroad and other property and premises to be received by him as aforesaid."

Afterwards, and on the 2d day of July, 1860, said receiver filed his report in the land-grant and Howard cases, showing the condition of said road, and the necessity of various expenditures in order to preserve the property and put it in a

condition to be properly operated. This report is found in Record No. 159, on pages 49 and 53. And on the 7th of July, 1860, an order was made in both cases, modifying the order appointing the receiver, and giving authority to him to protect and preserve said property, to purchase rolling stock, build fences, bring suits, arbitrate claims, and do generally, whatever might be necessary in the premises, and also providing as follows:

"The receiver, acting in pursuance of this or any former or any subsequent order or decree hereinafter to be made in good faith, and with ordinary care and prudence, shall not be individually liable for any breach of contract entered into by him as such receiver, or for any injury to person or property of the parties or of third persons, or for the faults or negligence of his subordinates, and for his indemnity against or exoneration from any and all such liabilities, should any such occur. The property, money, and effects that shall at any time be in his hands, as such receiver, shall be bound, and may from time to time, as may be necessary, be applied in such manner as the court shall direct."

Record No. 159, p. 53.

Acting under these orders, and, as was believed, for the best interest of the property, the expenditures for new buildings on the eastern division were made. E. H. Goodrich, the superintendent and manager of the road, under whose direction the improvements were made, testified:

"*Ques.* Item 28, of Exhibit E, is a charge for new buildings—$27,497.84. Where are those new buildings, what are they, and by what authority were they constructed?

"*Ans.* That item embraces the new buildings erected on the machine-shop grounds in Milwaukee, depot buildings at Portage City, extension of depot buildings, erection of waterhouses, and other improvements on the eastern division. There was no authority from the court for these erections, except the general orders of the court and the necessities of the road." [Record, p. 90.]

The above testimony was called out by the Minnesota company. On his cross-examination he testified:

"*Ques.* State whether the new buildings erected on the eastern division while in possession of the St. Paul Railway

Company were necessary for the proper, successful, and economical operation of the road.

"*Ans.* They were.

Ques. Has any work been done or improvements made on the eastern division while in the possession of the St. Paul Railway Company which were not demanded by the best interests of said division, and necessary to the proper operation of it as a railroad?

"*Ans.* There has not, to my knowledge."

There can be no doubt that the receiver in making these improvements was acting for the best interest of the property and in perfect good faith. The improvements were necessary and permanent, and no doubt would have been directed by the court had a special application been made therefor, on the proofs before the court on the hearing of the exception. The large discretionary powers vested in the receiver were sufficient to cover the case. The objection to the allowance of this item came from the Minnesota company, which has received the full benefit of the outlay, and on whose grounds these permanent structures are erected. No creditor of the road has objected. We therefore submit that the Circuit Court erred in sustaining said exceptions.

These two items were the only matters appealed from in appeal No. 43. The order appealed from should therefore be reversed.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 161.

This is an appeal in the case of Soutter, survivor, &c., from the order of the Circuit Court confirming the report of H. L. Palmer, auditor, and directing the Milwaukee and St. Paul Railway Company to pay within ten days into court the sum of $81,106.08 for the use of rolling stock from the 28th day of February, 1865, to the 9th day of January, 1866. There were two orders of reference and two reports of the auditor, upon which this decretal order to pay was based. The first order of reference was for use of rolling stock from February 28th, 1865, to August 1st, 1865.

Record 43, p. 554.

The report of the auditor on this reference is found in Record No. 62, p. 1. The other report for use of rolling stock from August 1st, 1865, to January 9th, 1866, is found in Record 161, at page 121, and the decretal order from which this appeal is taken is found in the same Record at pages 138 and 139.

This decretal order is based upon the assumption that all the rolling stock on the La Crosse railroad, when the receiver took possession thereof, except forty box cars, belonged to the east division, and is for the use of that stock by the St. Paul company. The questions here involved are precisely the same as in Record 43, and the decision of the court in that case will control this. It will not, therefore, be necessary to consume the time of the court by further argument in this case.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 62 of this Term, which was Argued as No. 212 of the Last Term, and not yet Decided.

On July 18, 1865, an order was made by the Circuit Court on the mandate of this Court, which mandate is found at page 15 of Record No. 42 of this Term.

"This mandate required 'the circuit court to ascertain the amount due to the claimants within some reasonable time to be fixed by said court, and to make an order that, on the payment of that sum, with the costs of complainants, into court within said time, the receiver shall be discharged, and the railroad from Milwaukee to Portage City, *with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road*, be delivered by said receiver to the Milwaukee and Minnesota Railroad Company."

Record 43, page 18.

The order entered on said mandate reads as follows:

"And on the same day came the Milwaukee and Minnesota Railroad Company by Matt. H. Carpenter, its solicitor, and on his motion, and on the mandate of the Supreme Court of the United States in this cause, ordered that the whole amount due the complainants in this cause and to become due before the day of sale of the mortgaged premises, are estimated, as now appears to be, as follows, viz: Amount fixed by order or decree *nisi*, $405,290.05, together with interest thereon since September 27, 1864; coupons due March 1, 1865, $40,000, with interest thereon since that date; coupons to become due September 1, 1865, $40,000, with interest thereon from that date; expenses, counsel fee, etc., allowed at $35,796.33, with interest thereon from this day.

"Ordered, further, that in case said Milwaukee and Minnesota Railroad Company shall, before a sale of the mortgaged premises in this cause, pay to the clerk of this court for the complainant in this cause the several sums above mentioned, with interest thereon as aforesaid to the day of such payment, and the costs in this cause to be taxed; that upon such payment the said receiver, Hans Crocker, *and the said Milwaukee and St. Paul Railway Company, its officers, directors, agents, and employees*, deliver over to said Milwaukee and Minnesota Railway Company the eastern division, so called, of the La Crosse and Milwaukee railroad, so called, from Milwaukee to Portage, *together with all the rolling stock that was on the whole of the La Crosse and Milwaukee Railroad, or belonged or appertained thereto, when the said receiver was appointed, except forty box cars numbered as follows, viz:* 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408; and also deliver to said Milwaukee and Minnesota Railroad Company such proportion of the rolling stock that was purchased by the receiver as 121,178 dollars bears to 26,199 dollars, together with all the rights, privileges and franchises, and personal and other property belonging or in any wise appertaining to said railroad from Milwaukee to Portage, and that the said receiver be thereafter dismissed and discharged, excepting for the purpose of passing his accounts.

"Ordered, further, that before the Milwaukee and Minnesota Railroad Company shall be allowed and permitted to enter into possession as aforesaid, it shall make, execute, and file with the clerk of this court a bond to the United States in the penal sum of twenty-five thousand dollars, with sufficient surety, to pay Sebre Howard and Selah Chamberlain, or the owners of said judgments, or either of them, all such sums as may come into the hands of said company which shall hereafter be found to be rightly applicable to the payment of their claims, if they shall be established as liens upon said road; and that said company execute its bond to Hans Crocker in the sum of twenty thousand dollars, with sufficient surety, to indemnify him for contingent liability mentioned in the report of the auditor in this cause.

"Ordered, further, that said Howard or Chamberlain may, at any time hereafter, apply to the court for an additional bond, if the circumstances of the case shall require it, both of said bonds hereinbefore mentioned to be approved by the clerk of this court.

"Ordered, further, that if the said Milwaukee and St. Paul Railway Company shall pay over the sum in its hands, or any part thereof, as this day ordered, the said Milwaukee and Minnesota Railroad Company shall only be required to pay to the clerk of this court the balance of the amount so due said complainant at the date of payment by said last named company, over such sum so paid by said Milwaukee and St. Paul Railway Company, and said Milwaukee and Minnesota Railroad Company shall be entitled to possession, as hereinbefore mentioned, upon payment of such balance, and giving bonds as hereinbefore ordered."

Record No. 43, p. 552–3.

Appeal No. 212 is from this order. There is nothing of importance in Record 62, so far as these appeals are concerned.

I.

The order of July 18, 1865, relative to the delivery of rolling stock, which is the subject of the appeal in No. 62, was unwarranted and erroneous, and should be reversed.

This order, which is recited above, is found on pages 552, 553 and 554 of Record No. 43, and purports to have been made on the motion of the Minnesota Company, on the mandate of the Supreme Court of the United States. It is wholly based on said mandate, and no other proceedings were had upon it. Did that mandate authorize this order? The mandate directed an order to be entered in the circuit court, that on the Minnesota company performing certain conditions, "the receiver shall be discharged, and the railroad from Milwaukee to Portage City, with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road, be delivered *by said receiver* to the Milwaukee and Minnesota Railroad Company." This mandate directed an order to be entered against him alone; but the order entered was, that "the said receiver, Hans Crocker, and the said Milwaukee and St. Paul Railway Company, its officers, directors, agents,

and employees, deliver," &c. The St. Paul company was not the receiver, and the order was directed to be entered by the mandate against the receiver alone. The St. Paul company never had been receiver in this cause. The order of June 12, 1863, in the Howard case, made the St. Paul company the custodian of this property under the receiver, or, if you please, his agent or a *quasi* receiver; but that order was rescinded April 28, 1864, and on the 1st day of May, 1864, said company surrendered all control over the property to the receiver, who, from that time, had the possession, control, and management thereof.

Record 43, pp. 124, 125, 126 and 127, 106.

The St. Paul company, as we have seen, was not a party to this suit, and no more subject to the orders of the court, in this case, than any other person not connected with the record. Why, then, should the order of the court be made against it? The mandate did not direct it. With equal propriety the order might have directed Mr. Mitchell, the president, or Mr. Merrill, the general manager of the St. Paul company, to have delivered this property or any other property of their own or in their possession, and there was just the same legal right to subject them or any other outside party to this order, and impose upon them its duties and burdens, as there was to subject the St. Paul company to it. The order entered in the circuit court was clearly in excess of the mandate in this particular, and was not authorized, and for that reason should be reversed.

2. This order is erroneous in that it does not follow, but exceeds the mandate in the property directed to be delivered.

The mandate directs an order for the delivery of "the railroad from Milwaukee to Portage City, with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road." The order directs the delivery of said line of railroad, "together with all the rolling

stock that was on the whole of the La Crosse and Milwaukee railroad, or appertained thereto, when the said receiver was appointed, except forty box cars," &c. This order was not in pursuance and according to said mandate, but directed the delivery of nearly or quite half a million dollars worth of property not included in it.

When this court reverses a judgment or decree brought here on error or appeal, and remands the case, with a mandate to enter a certain judgment, the court below has no authority but to execute the mandate as directed. Hence, in this case the order should have been entered as directed. The mandate was explicit, and required a certain order, but the order entered was not in the terms of the mandate. It cannot be demonstrated from the record that the terms of the order were the equivalent of the mandate; on the contrary, we insist the order went far beyond the mandate, and covers and includes a very large amount of property not covered by the mandate. There were no proceedings in the court below to explain the terms of the mandate; none were ordered; and no explanation was necessary, as we have said, it was quite explicit; and the only power or duty of the court below was to enter the order in the terms commanded. If the duty of the court below on such a mandate is not clerical or ministerial merely, it differs but little from it. It has no discretion, but must obey the mandate; and the order or judgment, when entered, is the judgment of this court, and not of the circuit.

If the circuit court could alter this mandate by enlarging it, by the same right they could alter by diminishing it, and, in fact, from an inspection of the record above, it is impossible to tell whether this alteration has enlarged or diminished the extent of the mandate. We know that the insertion of the St. Paul company was an enlargement, but the effect of this last alteration is not apparent from the order itself. Still the order as entered stands as the judgment of this court, and authorized solely by its mandate.

If the circuit court could alter the effect of the mandate by including this rolling stock, why could it not still further have enlarged it and made it include the celebrated forty box-cars, and the west division even of the railroad?

If it can be altered at all, it is difficult to tell where the alternation should stop. The order was not entered on a trial and an investigation of facts and the law, but on the order, command, of this Court, and should have been confined strictly to the command.

The question of the ultimate right or ownership of this rolling stock was not and could not be determined. This was not a proceeding to take property from parties into the custody of the court, or to take it from one party and give it to another. The first can be done only on application to appoint a receiver in a suit where the possessor of the property is a party; the latter only after final judgment, and is the proper function of an execution or process in the nature of an execution.

This property was not in the custody of the court, and had not been for over two years when this order was made. It had been delivered to the St. Paul Company under its purchase in the land grant case, in June, 1863, and from that time until the making of this order, had remained in the exclusive custody and control of that company, claiming it as owner under its said purchase.

The Minnesota Company had so recognized it, and on the 10th day of August, 1864, had filed its bill against the St. Paul Company, setting forth that this property was in our possession and that we so claimed it as owner, and setting up their title thereto, and praying that it might be decreed to belong to said Minnesota Company; that the St. Paul Company might be compelled to account for its use, and that a receiver might be appointed to take and hold possession pending the litigation. This bill was answered by the St. Paul Company, and at the time when these orders were made was at issue between the parties, and has since been tried, and we have now just considered it on appeal.

In that suit it would have been legitimate, had the court deemed it advisable or proper, to have appointed a receiver to have taken possession of said property, and on a final hearing, to have granted the relief therein prayed, had said bill been sustained. In that suit we are parties, have pleaded, and can have our day in court.

But these orders, in a summary way, in a suit in which we are not parties, and where we cannot make our defence, grant all the relief prayed in that bill, strip us of half a million dollars' worth of property, and render judgment against us for its use for several hundred thousand dollars in addition. It is from such orders that we have appealed in these cases.

This suit, so brought by the Minnesota Company, is still being prosecuted, and a double recovery sought for the same cause of action. In that suit that company has pleaded this order as a bar to our rights, and if this order is sustained a double recovery may be had against us.

NO'S 172, 173 and 230.

ALEXANDER FLEMING, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR &c., APPELLEE.

No. 172.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 173.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c., APPELLEE.

No. 230.

These are appeals from two decretal orders made in the case of Soutter, survivor, &c., second mortgage case, for the sale of the east division of the La Crosse and Milwaukee Railroad.

No's 172 and 173 are two appeals from the same order, and No. 230 is an appeal from a subsequent order of sale. The record of the two first appeals is found in the volume contain-

ing the record No. 161, at pages 146 to 156. The decree of foreclosure and sale first entered in this cause January 13th, 1862, was appealed to this court and reversed at December term 1863, and the mandate of this court, sent to the circuit on that appeal, directed among other things, as follows:

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the District of Wisconsin, with direction to enter a decree for all the interest due, and secured by the mortgage, with costs. * * * * And in case such balance is not paid within one year from the time of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court; and on bringing the proceeds into court they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest, down to the sale; and if they exceed that, to the principal. * * * * And, further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interests, and ultimately for the principal."

Record 280 of 1864, p. 9.

On this mandate the circuit court on the 27th day of September, 1864, entered its final decree, ordering and decreeing among other things as follows:

"And it is further ordered, adjudged and decreed that unless the said sum of four hundred and forty thousand dollars be fully paid at or before the expiration of one year from the date of this decree, that the usual order will be made for the sale of the mortgaged premises, &c. And it is further ordered and adjudged that after the expiration of the said year, the complainant shall be at liberty when further instalments of interest shall be due and remain unpaid, or when the said principal sum shall be due and remain unpaid, to apply for an order for a sale of the said mortgaged premises, as directed by and in accordance with the mandate of the supreme court."

Record 280 of 1864, p. 261.

An appeal was taken from this decree, by the Minnesota Company to the supreme court, (said record 280 of 1864,) and the decree was affirmed as a compliance with the mandate of this court, 2 Wallace, 510. Afterwards, and on the 28th day

of September, 1865, an order of sale of the mortgaged premises was made for the interest due and remaining unpaid on said mortgage.

Record No. 62, pp. 36 to 38.

Prior to the sale, and on the 4th day of January, 1866, the interest then due was paid, and the proceedings for a sale stopped. Subsequently, and on the first day of September, 1866, default was made in the payment of the instalment of forty thousand dollars falling due on that day. The complainant Scutter on the 10th day of September, 1866, applied to the circuit court by petition setting forth said default and praying that an order of sale in the usual form might be made as provided in the said decree of foreclosure rendered in this suit.

Record 146 and 147.

On the 17th day of September the parties appeared in the circuit court and said petition came on to be heard, and was argued by counsel. The court took the same under advisement, and on the 18th day of September, 1866, made the order of sale as prayed.

Record 147 to 149.

On the same day Alexander Fleming, who claimed to be a party defendant in this suit, prayed an appeal and supersedeas from said decretal order, which was allowed.

Record 149 and 150.

On the 29th day of September the Minnesota company prayed an appeal and supersedeas from the same decretal order, which was allowed, and is the appeal No. 173.

Record 150.

On the first day of March, 1867, default was made in the payment of the instalment of interest of forty thousand dollars which fell due on that day, and on the 5th day of said March the complainant Scutter applied to the circuit court by petition setting forth the said default and praying an order of sale of the mortgaged premises, in accordance with the

decree in this action, notice of which application was served upon the Minnesota company. On said 5th day of March the usual order of sale was made by the court, in accordance with the decree in this cause, and on the 6th day of March the Minnesota company prayed an appeal, which was allowed.

Record 230 of this term.

The only grounds of appeal upon which it is proposed to ask a reversal of these orders, so far as we have been able to learn from the counsel opposed, are—

First. That the practice in procuring these orders was erroneous, in that the application therefor should have been by supplemental bill, instead of by petition.

Second. That the instalments of interest were not due until the expiration of sixty days from the first days of March and September respectively.

Let us briefly examine these objections.

I.

The application by petition was regular. No supplemental bill was required in this case.

The application was upon the decree of the court. That decree had established the rights of the parties, and the relief prayed was based upon it. It was an application for an order of sale on the foot of that decree.

A supplemental bill in such a case is never required. To require the filing of a supplemental bill, would defeat all the benefits to be derived from having the decree stand as security for subsequent defaults. The object of having it so stand is to avoid the expense and delay of a suit.

Lansing vs. Capron, 1 John. Ch'y, 617.

Campbell vs. Macomb *et al*, 4 John. Ch'y, 534.

The former practice in such cases was for the complainant as often as subsequent interest became due "to go before a master upon the foot of the decree and obtain a report as to the sum then due and payable, to the end that such report being made to this court, an order might (may) thereupon be made for a further sale," &c.

Brinckerhoff vs. Thallheimer, 2 John. Ch'y, 485.

Marshall vs. Thompson, 2 Munford, 412.

It was proper for the court to act as its own master, and ascertain the amount due, as is usually done in cases where there is no dispute about amounts. The proper practice now is to apply to the court by petition.

2 Barbour's Ch'y Pr., 183 and 184.

2 Daniels' Ch'y Pr., 1203.

The Revised Statutes of Wisconsin provide for this practice. If payment of interest, with costs, is made before the entry of an order of sale, the suit must be dismissed; butif made after an order of sale, "the court shall enter a judgment of foreclosure and sale, to be enforced by a further order of the court upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due."

Revised Statutes of Wis., 858, §§ 4 and 5.

A supplemental bill is inappropriate and improper in such a case, and the proper practice is by petition, or some other summary proceeding, to inform the court of the default.

The appellants appeared to resist the first order, and were notified of the second application, but did not appear.

The complainant's practice was regular, and the order should be affirmed.

II.

The instalments of interest for which these orders of sale were respectively entered fell due and became payable, the *first* on the first day of September, 1866, and the *second* on the first day of March, 1867, and there is no provision in the mortgage requiring the complainant to wait sixty days after such default before applying for an order of sale.

The mortgage provides that in case of default for the space of sixty days after the interest or principal becomes due, the trustees may proceed under the power to sell, either at public or private sale, without the intervention of a court. We copy the provision at length:

"Second. In case default for the space of sixty days shall be made in the payment of any of said interest warrants, or coupons, as they respectively fall due, or if default for the like period shall be made in the payment, at maturity, of the principal sum of money mentioned in any of the said bonds, then, and in either of said cases, it shall be lawful, and said trustees are hereby authorized, in their discretion, either in person or by their attorney or attorneys, agent or agents, to enter into and upon, and take possession of, all and singular the railroads and all the other property, real and personal, hereinbefore conveyed, or intended to be conveyed, and to take and receive the income and profits thereof, and to sell all and singular said railroads and other property, with all the rights, liberties, privileges and franchises of said railroad company, in respect to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in said purchaser or purchasers all the estate, right, title and interest, whether legal or equitable, of said trustees and said railroad company of, in or to said property, rights, liberties, privileges and franchises, and every part and parcel thereof. But before any sale shall be made at auction notice of such intended sale shall be published once in each week for twelve weeks at least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the

laws of the state of Wisconsin the same shall be given. And in case the interest in default shall at any time be equal to the amount of the interest for one year on all the bonds then outstanding, or in case default shall be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then, and in either of said cases, said trustees, on the written request of the holder or holders of the major part in amount of the bonds then outstanding, shall proceed to make such sales and conveyances as are above mentioned.

Record 132 of 1863, p. 118, or record 279 of 1864, p. 53.

This provision has no application where the trustee forecloses by the aid of a court of chancery. It is not an extension of the time of payment, and if the mortgage is to be enforced by suit to obtain a decree of foreclosure, there is no requirement to wait sixty days, or any other time after the debt is due and payable, before commencing suit.

This clause authorizes the trustees, instead of proceeding in chancery, to proceed under the power and authority given in the mortgage, without the aid of any court, and at once to take possession of the mortgaged property, receive its revenue, tolls and income, and to sell it at either public or private sale, as they may deem advisable; but in that case they are to wait sixty days after default before exercising the power thereby conferred. But this limitation has no application when the proceedings are not under the power. It has no effect when the foreclosure is by suit in chancery. Hence the objection that the instalments of interest were not due when application for these orders was made has no foundation in fact.

III.

The application for these decretal orders was regular, and the orders properly granted. There was no error in the proceeding, and the orders should be affirmed

MILWAUKEE AND MINNESOTA RAILROAD COMPANY, Appellant,

vs.

FREDERICK P. JAMES, Appellee.

Nos. 231, 232 and 233.--December Term, 1867.

There are three appeals, all in the same cause and between the same parties, and the records are all contained in the same volume.

One of the appeals is from the final decree, Record 89 and 90, taken by Bright and Gunnison, in the name of the Minnesota company.

The second appeal is from the same decree, and is taken by the Minnesota company.

Record 101 and 102.

The third appeal is by the Milwankee and Minnesota company from the order confirming report of sale.

Record 102 and 103.

The bill of complaint was filed on the 18th day of April, 1866, by Frederick P. James, against the Milwaukee and Minnesota Railroad Company, and sets forth, in substance—

That on the 7th day of October, 1857, in the District Court of the United States for the District of Wisconsin, Newcomb Cleveland recovered against the La Crosse and Milwaukee Railroad Company a judgment for the sum of $111,727.71 damages, and $544.15 costs, which judgment was then and there duly entered and docketed. That said judgment had been assigned to said complainant, and that he is now the lawful holder and owner of said judgment, and that the same now remains in force and unsatisfied for the sum of $76,526.39

principal, and interest thereon from the 28th day of November, 1862, which sum is unpaid and justly due complainant. That at the time of the entry and docketing of said judgment said La Crosse Company owned and possessed a railroad and appurtenances, known as the La Crosse and Milwaukee railroad, extending from Milwaukee to La Crosse, in the District of Wisconsin, upon which railroad and appurtenances said judgment became and was a lien.

That subsequently and on the 21st day of June, 1848, said La Crosse company mortgaged said railroad and appurtenances to William Barnes in trust, to secure certain bonds.

That said Barnes foreclosed said mortgage by advertisement, and organized a new company under the laws of Wisconsin, and took the name of the Milwaukee and Minnesota Railroad Company, to which said Barnes, as purchaser under his said mortgage, conveyed said railroad with its rolling stock and appurtenances, and which said Minnesota company is now in possession and enjoyment of said railroad from Milwaukee to Portage.

That said Barnes' mortgage was fraudulent as to creditors, and that said Minnesota company holds said property in fraud of the rights of the just creditors of said La Crosse company.

That complainant's said judgment was subject to the lien of the land-grant mortgage given by the La Crosse company to Bronson, Soutter and Knapp, as to all that part of said railroad lying west of Portage; that said last named mortgage has been foreclosed, and the lien of said judgment extinguished as to that part of said railroad.

That in the latter part of the year 1857, or early part of 1858, said La Crosse company became insolvent and utterly worthless, and that it has now no property either in possession or expectancy; and that it has no officers or place of business, and has ceased to act or exist as a corporation.

That said judgment is a lien upon said railroad and its appurtenances from Milwaukee to Portage, and that he has no adequate remedy thereon at law, and can only obtain the fruit thereof by the interposition of this honorable court.

That said railroad and its appurtenances is encumbered by liens prior to said judgment, to Francis A. Palmer, City of Milwaukee, Bronson and Soutter, and Selah Chamberlain, to the amount of about three and a half million of dollars.

That said Minnesota company is utterly and wholly insolvent; that it has made a mortgage on said railroad for $600,000, which is junior to said judgment; that it is diverting the revenues to the payment of interest on that mortgage, but neglects to pay interest on said prior incumbrances, but fraudulently diverts the same, to the injury of said complainant.

That an execution was issued on said judgment in 1857, and levied on said railroad and appurtenances and returned to said court. That no sale was ever had, but that said levy still has all the force that it ever had or could have. The bill prays that said judgment may be decreed a lien as of its date; that a receiver of said road and property may be appointed, and that said road and its appurtenances may be sold, subject to prior liens, and said judgment paid out of the proceeds of said sale.

Record, pp. 1 to 4.

The Minnesota company answered said bill, admitting the recovery of the judgment and issuing of execution, but does not know amount due thereon. Denies that James owns it. Admits La Crosse company owned railroad as charged, but denies judgment was a lien thereon. Sets out giving Barnes mortgage, its foreclosure, formation of Minnesota company, and alleges it succeeded to all rights of the of La Crosse company. Denies that Barnes mortgage was fraudulent, and alleges organization of Minnesota regular and valid. Admits the mortgage to Bronson,

Soutter and Knapp a lien on western division of railroad prior to complainant's judgment, but denies that it has ever been foreclosed, because not legally confirmed, and that St. Paul company is a necessary party to this suit. Denies that said judgment is or ever was a lien upon said eastern division of said railroad, its appurtenances and fixtures. Admits said eastern division is encumbered with liens as follows: To Francis A. Palmer, $875,000; city of Milwaukee, $314,000; Bronson and Soutter, $1,000,000, and Scribner and Fonda, $600,000, and not encumbered with any other liens whatever, and *on information and belief denies that it is insolvent*, and denies that it is diverting revenues of road as charged.

That said eastern division for years prior to January, 1866, was in hands of receiver, and that defendant was compelled to pay $467,000 to prevent its being sold in January last, on claims prior to said judgment, and that there is a fund in court applicable to payment of interest on prior claims.

That James was a director of St. Paul, and that company refused to deliver rolling stock as it ought, to defendant; denies that any proceedings have been taken to make judgment a lien, on the said railroad and appurtenances and says that they are now owned by defendant free of said judgment, and sets up the proceedings of James in another suit (number 55 of this term) as a bar to any attack by James upon defendant's title under the Barnes' mortgage, claims lease and judgment to Chamberlain fraudulent, and made to hinder and delay creditors and enable said La Crosse company to apply its means to the completion of its road. That Cleveland issued an execution and levied on certain lots of the La Crosse company not needed for its road, sufficient to pay it, and afterwards impleaded Chamberlain and others with said company and obtained a decree declaring said lots subject to his said judgment. That Chamberlain subsequently became the owner of said Cleveland judgment and released said lots and that said defendant had no lien thereon,

and that thereby said complainant is barred from enforcing said judgment against the property of this defendant. That Chamberlain received sufficient net revenues from the operation of said road to pay the Cleveland judgment. That Chamberlain received more than enough to pay this mortgage from the operation of said road. That he fraudulently made default in payment of interest on the Bronson and Soutter mortgage, and entered into a fraudulent arrangement for its foreclosure whereby defendant was compelled to pay $467,000 to prevent a sale of the property, and defendant claims that it is entitled to be subrogated to the rights of Soutter, survivor, &c., as to that amount in preference to said judgment.

Record, pp. 6 to 58.

The complainant filed a supplemental bill which was answered, but the matters therein contained related wholly to the application for a receiver, and are not material to the questions now at issue.

Record, pp. 59 to 65.

The decree declared said judgment a lien as of the 7th day of October, 1857, upon the interest of the La Crosse railroad company in said La Crosse and Milwaukee railroad, and that the sum of $98,801.51 was due thereon, that said La Crosse company had ceased to exist as a corporation, and that said Minnesota company had succeeded to its rights subject to the liens, charges and encumbrances thereon; specifies the liens prior to said judgment, and that the western division of said road had been sold, as alleged in said complaint, and directs a sale by the marshal of the road from Milwaukee to Portage, and its appurtenances to satisfy said decree.

Record, 67.

February 23d, 1867, a petition of the Minnesota was filed to stay sale, and open and vacate said decree, which, after hearing the parties, was denied.

Record, 69.

March 2d, 1867, Aaron S. Bright and Albert C. Gunnison, claiming to be stockholders, filed a petition setting up at great length the quarrels of the Minnesota company among themselves, and asking that the decree may be vacated, and that they may come in and defend said suit. Which was denied.

Record, pp. 71 to 89.

The marshal's report of sale is found on pages 94 to 96 of Record, and the order of confirmation on page 97. The proofs in the case are found commencing at page 105 of Record.

The complainant reproduced proofs showing the transfer of the said Cleveland judgment to him.

Record, pp. 105 to 109.

Also conveyances and agreements showing that the lots levied on by Cleveland, as stated in the answer, were released therefrom by Chamberlain, at the request of the Minnesota company, and by a mutual arrangement between the Minnesota and La Crosse companies.

Record, pp. 109 to 117.

The defendant's testimony was all documentary, and was admitted by stipulation, which is found in Record, pp. 133 to 135.

I.

The Cleveland judgment became a lien at the time it was docketed—on the 7th of October, 1857—upon all the right, title and interest which the said La Crosse and Milwaukee Railroad Company had, of, in and to the La Crosse and Milwaukee railroad, its rolling stock, franchises and appurtenances, subject to which were all suqsequent conveyances by that company.

The La Crosse and Milwaukee railroad company owned its road bed, depots, depot grounds, and all its appurtenances, in fee simple.

The charter of said company—Session Laws of 1852, page 332—says that said company may exercise the right of *eminent domain* in taking lands for the purposes of its road, "and on the payment of the compensation provided by said act to the party entitled to the same, *the title to said lands shall vest in the said company in fee simple.*"

The legislature of Wisconsin have expressly provided that "all rolling stock of any railroad company used and employed in connection with its railroad, shall be, and the same are hereby declared to be fixtures."

Session Laws of 1866, chap. 121, § 2.

Revised Statutes of Wisconsin, 511, § 34.

The federal courts have also uniformly held, that rolling stock is a fixture to a railroad, without or independent of a statute.

Pennock vs. Coe, 17 Howard, 117.

See also Palmer vs. Forbes, 23 Illinois, 300.

Hunt vs. Bullock, 23 Illinois, 320.

We therefore assume that, in Wisconsin at least, a railroad, including its road bed, depots, depot grounds, rolling stock, and all its appurtenances, is real estate. It is so treated in all the cases and in all elementary works.

If it is real estate, then it was subject to the lien of the Cleveland judgment by express provision of law. The Revised Statutes of Wisconsin of 1849, § 5 of chapter 102, provide that "All judgments hereafter rendered in any court of record shall bind and be a charge upon the lands, tenements, real estate, and chattels real, in every county where the record or a certified transcript thereof shall be filed, of every person against whom any such judgment shall be rendered, which such person may have in such counties at the time of docketing such judgment, or which such person shall acquire at any

time thereafter, and such estates and chattels real shall be subject to be sold on execution to be issued on such judg ment."

The Revised Statutes of 1858, now in force, provide that "Judgments shall be a lien on the real property in the county where the same is docketed, of every person against whom such judgment shall be rendered, and which he may have at the time of docketing thereof in the county in which such real estate is situated, or which he shall acquire at any time thereafter for ten years from the time of docketing the same, in the county where it was rendered."

Revised Statutes, 758, § 36.

There is no exception from such lien of the real estate of a railroad company, and there is no reason why railroad real estate should not be subjected to the lien of judgments against the company the same as other property, but every reason why it should. The collection of debts from railroad companies is already environed with sufficient difficulty, without adding this disability. Railroad companies, as a general thing, own their roads in fee, the great majority of their property, depot grounds and other lands being acquired by purchase, and to exempt them from the lien of judgments, would be an unnecessary innovation of the law of lien, and deprive creditors of their just rights.

It has been contended that judgments are not liens upon railroads, for the reason that it is contrary to the policy of the law to allow railroads to be sold on executions at law, and it is insisted *that a judgment is a lien only where it can be enforced against the property by an execution.*

This proposition we deny. It is true that where the statute does not make judgments a lien upon real estate that the lien is a consequence of the right to issue an *elegit*, but such is not the case where judgments are made a lien by express provision of law.

At common law a judgment was not a lien upon land until the statute of Westminster (2—13 Edward I., C. 18,) gave the writ of elegit.

3 Blackstone Com., 418.

This writ subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor.

Massinall *et al. vs.* Downs, 7 How., 765.

3 Salkeld, 212.

1 Wilson, 39.

The lien being the consequence of the writ of elegit, it followed that it could exist only while and where such writ could issue and be executed, as there was no law making judgments a lien.

Several of the states have not altered the English practice, and in such states there is no lien except what results from the right to issue an *elegit*. Such is the law in Virginia, and in the New England states judgments are not a lien until execution issues, and in Kentucky lands are only bound from the delivery of execution, the same as chattels.

4 Kent's Com., 435.

In Schaffer *vs.* Cadwallader (36 Penn., 128,) Mr. Wharton says: "There is not an act in this state which expressly or necessarily declares a judgment of itself to be a lien on lands; but the act of 1705 renders lands liable to execution in default of sufficient personal estate, and from this source the lien of judgment in Pennsylvania is derived."

Brightly, Purd., 462.

Chief Justice Lowry in that case says that there is no lien on the lands belonging to the municipality, because there is no way recognized by law in which it could be enforced, the courts being prohibited from collecting such judgment except by compelling the levying of a tax.

In United States *vs.* Morrison, (4 Peters, 136,) Chief Justice Marshall says: "There is no statute in Virginia which, in ex-

press terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is a consequence of a right to take out an *elegit*. During the existence of this right the lien is universally acknowledged."

But this doctrine has no application to this case, for the reason that in Wisconsin, as we have already seen, there is an express statute making judgments a lien upon lands, tenements, real estate and chattels real.

The statute of Wisconsin makes a judgment an express and absolute lien, independent of the process by which it may be enforced. Executions cannot issue in Wisconsin after five years without an application to the court or notice to the defendant; but this lien, provided by statute, remains in full force for ten years against all parties, regardless of whether an execution may ever issue upon it.

The supreme court of Wisconsin have construed this statute, and hold that the lien attaches for ten years, even when the process of execution is absolutely forbidden. They held that it attached to a homestead, which is exempt from forced sale on execution.

Hoyt *vs.* Howe, 3 Wisconsin, 752.

Johnson *vs.* Simmons, 14 Wisconsin, 527.

Hence we see that the English rule that the lien is the consequence of the right to issue an *elegit* does not prevail in Wisconsin, but that the lien attaches under their statute, notwithstanding that execution is denied.

An execution is not the only means by which a judgment lien can be enforced. As we have seen, the lien of the judgment under our statute is absolute, perfect, and independent of the means by which it is to be enforced. If for any reason the lien is not to be enforced by execution, the power of a court of equity may be invoked in aid of the judgment lien, especially is this appropriate when, from matters of state policy, or the general interests of the debtor, the aid of a court of chancery is necessary to prevent a sacrifice of his property.

The fact that the debtor requires such protection is no reason why the creditor should lose his lien. If it is necessary to invoke the equity powers of the court in order to protect their rights, instead of issuing the ordinary executions, such proceeding to enforce the lien of the judgment would be in the place of an execution, and the lien of the judgment would not be affected thereby, but would be protected and enforced.

II.

An execution at law is not an adequate or sufficient remedy to enforce the lien of a judgment against the lands and real estate of a railroad company, constituting its road bed and depots and the rolling stock and fixtures used on or in connection with its road.

The company owns the real estate over and upon which its road is constructed and depots erected, but they are comparatively valueless separated from the rights and franchises of the company to operate the road and receive income therefrom.

A judgment, under our laws, becomes a lien upon this property as real estate, and by the strict rule of law is subject to sale on execution as real estate, and in State vs. Rives, 5 Iredell, it was held that when a sale on execution had taken place that it transferred the real estate to the purchaser.

But it is well settled, however, that the franchises and rights of the company cannot be sold on execution unless authorized by statute.

Gue vs. Tide Water Canal Co., 24 How. 257.

State vs. Rives, 5 Iredell.

Seymour vs. Milford Turnpike Co., 10 Ohio, 476.

Hence a sale of the real estate and property of a railroad company on execution, if permitted, would separate the ownership of the property from the right or franchise to use it, which would render both nearly or quite useless and valueless.

The case of Gue vs. Tide Water Canal Company, 24 Howard, 237, holds "that the franchise of the company, or right to take toll on boats going through the canal would not pass to the purchaser under the execution."

The case further holds that to allow the real estate to be sold on execution would separate it from the franchise and destroy the property; that it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise, property which was essential to its useful existence. A sale on execution was therefore enjoined.

The proceeding in the case of State vs. Rives was an indictment against Rives for tearing up the track of the railroad after he had purchased it on execution sale. No proceeding had been taken in equity or otherwise to enjoin the sale, but it was suffered to take place on the execution, and the indictment against him assumed to ignore the sale as wholly void. But the court held that if the sale was regular, inasmuch as it had taken place, it would have the legal effect of transferring the real property of the company so sold to the purchaser.

The question of the propriety or equity of allowing such a sale to take place was not before the court, but only the legal effect thereof after it had been suffered to take place.

It cannot therefore be considered as an authority authorizing a sale on execution, when the question of right to proceed is brought to the attention of a court of equity before the sale takes place, and if it could, it is overruled by the case of Gue vs. Tide Water Canal Co., in this court.

Gwynne's Law of Sheriffs and Coroners, 341.
2 Redfield, 544. Note and cases cited.

III.

The remedy at law being inadequate and inappropriate to enforce the lien of a judgment in such a case, a court of equity alone can afford the proper and requisite relief, and is the proper forum in which to obtain satisfaction of such judgment, where a sale of the whole property, including its franchises, will be ordered, for the payment of the debt.

In the case of Gue, above quoted, it was not necessary for the court to decide this question. The only matter presented in that case was whether a sale on execution would be allowed, which the court refused, and then say, "If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned.

This case clearly holds that we cannot proceed by execution at law, and that our only remedy is in equity—to have the whole property sold and the proceeds applied to the payment of the debts of the company.

Wherever there is a legal right and no adequate remedy at law, equity will furnish the remedy.

Therefore, in this case the complainant was entitled to seek the aid of a court of equity to enforce this judgment lien and obtain the fruits of his judgment. The usual course in such cases is for the court to appoint a receiver to take possession of the property, and to apply the income, rents, tolls or profits to the payment of the debt, provided said income, &c., will pay it within a reasonable time.

Covington Draw Bridge Company vs. Shepherd and others, 21 Howard, 112.

But where payment of a judgment cannot be attained at all by a mere application of the rents and profits, or where the payment cannot be obtained out of the rents and profits within a reasonable time, courts of equity will accelerate the payment by decreeing a sale of the property.

2 Story's Equity, §§ 1216 *a* and 1215 to 1220.

This doctrine has been sanctioned and approbated in this court in several cases.

United States vs. Morrison, 4 Peters, 124.

Benton vs. Smith *et al*, 13 Peters, 464.

See also the case of Tenant's Heirs vs. Patton, 6 Leigh, 196.

In this last case the debt was $820, and the annual value of the land was $400; yet the court accelerated the payment of the debt by decreeing a sale in equity.

The case of Macon and Western Railroad Company, 9 Georgia, 377, is a case where a court of equity entertained a bill for the sale of a railroad on several judgments, and decreed a sale and distributed the proceeds. The doctrine of this case was fully approved by this court in Covington Bridge vs. Shepherd *et al*, 21 Howard, 112.

In this case the debtor company became totally and hopelessly insolvent more than eight years prior to the commencement of this suit, and its successor, the present defendant, admits its inability to pay the interest on prior incumbrances out of the earnings of the road or otherwise, and denies its own insolvency only on information and belief, which is no denial of the fact.

It is evident, therefore, that there was no prospect that this judgment would ever be paid from the income of the road, as administered by the defendant, and it was therefore a proper case for a court of equity to accelerate payment by ordering a sale of the whole property.

The only remaining question is, could a court of equity direct a sale of the franchises of the company?

It is a matter of no consequence for us to inquire whether such a sale would transfer the franchises to exist as a corporation or to exercise the right of eminent domain in taking real estate or similar franchises. In fact we may admit, so far as the purposes of this suit are concerned, that they did not pass. The material inquiry is, did the franchise to operate the road and to receive the income and tolls, pass by the sale?

"The franchise to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in, and being enjoyed by, natural persons, and there is nothing in their nature inconsistent with their being assignable."

Curtis' Opinion, 2 Redfield on Railways, 518.

The legislature of Wisconsin conferred these rights on the La Crosse company by its charter [Session Laws of 1852, chap. 325, sec. 8], and by the same section authorized them to sell or lease the railroad they were authorized to build. This no doubt authorized them to confer upon the purchaser all the franchises of which the company was possessed necessary to the beneficial use of said railroad.

Subsequently the legislature authorized said company "to mortgage its road by trust deed, and to authorize the trustee therein to enter into and upon, and to take possession of, have, use and employ, or to sell and dispose of the whole or any part of said railroad or estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and privileges of said railroad company."

Private and local laws of 1856, chap. 78, sec. 1.

In the general laws of 1856, chap. 121, sec. 1, provision is made for all railroads to borrow money and pledge their "railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furni-

ture, tools, implements, appendages and appurtenances belonging to or used in connection with such railroad or railroads, in any manner whatever," &c.

This provision was afterwards, in 1858, incorporated into the revised statutes of the state.

Revised Statutes, 510, sec. 33.

This La Crosse company, therefore, had the most full and ample power *voluntarily* to alienate its property and franchises of every description. The policy of the state was fully established in this particular. Their road and franchises were property, and if the legislature gave them full power and authority to voluntarily alienate it, as security for the company's debts, or in any other manner, there can be no objection to compelling the company to part with it, *in invitum*, in payment of the company's debts. To hold otherwise would enable the company, at its option, to hold its property in defiance of its creditors, and would be rank injustice. There can be no doubt of the right of a court of equity to direct a sale of this road, with its franchises, and the decree should be affirmed.

BILL.

THE MILWAUKEE AND MINNESOTA RAILWAY COMPANY, APPELLANTS,

vs.

SELAH CHAMBERLAIN AND MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLEES.

CROSS BILL.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLEE.

Nos. 219 and 220 of December Term, 1867.

The original bill of complaint is found at page one of record, but it was subsequently amended by striking out the whole thereof except the address and description of parties, and a new bill substituted. The bill of complaint was filed against Chamberlain alone, and the St. Paul Company was subsequently made a party defendant.

The amended bill of complaint is found at page 65 of record and sets forth the existence of the La Crosse company, the making of the Barnes' mortgage sale of bonds, default in payment of interests, foreclosure and sale to Barnes, organization of the Minnesota company, and conveyance of mortgaged property to it, and that said Minnesota company thereby became the owner of said property subject to prior legal liens,

and that said Minnesota company is entitled to object, resist and set aside all conveyances, negotiations, sales, transfers and leases, mortgages or judgments, which were or have been made, or suffered by said La Crosse and Milwaukee railroad company with intent to hinder, delay or defraud its creditors, and all fraudulent claims against said La Crosse company, which are apparently liens on said property, and to collect and enforce all actions in favor of said company. That the La Crosse company on the 26th day of September, 1857, was greatly embarrassed and in failing circumstances, and was unable to pay its debts and prosecute the completion of its road, which was then only constructed from Milwaukee to New Lisbon, and said company with a view to hinder and delay its creditors made, or pretended to make a lease to said defendant Chamberlain, of its road and property, and put him in possession thereof. That said company had no legal right or competent authority to make and deliver said lease, and that the making and delivery thereof were acts beyond the corporate power of said company and void, and that it is void as to all creditors, and as to complainant, for the further reason that it was made with the intent and design of said company to hinder, delay and defraud its creditors, and particularly Vose, Livingston & Co., creditors of said company, and to prevent them from asserting their claim to certain railroad iron, which design of said company was well known to said Chamberlain when said lease was accepted by him, and he accepted the same with the view of aiding said company in said purpose.

That afterwards, on the 2d of October, 1857, said company with the same design confessed a judgment to said Chamberlain in the District Court of the United States for the sum of $629,089.72 and costs, which was duly confessed and docketed, but that said company was not then indebted to said Chamberlain and did not owe him any amount whatever, and that there was no consideration therefor, and that it was confessed by said company in pursuance of said fraudulent design, with

intent to hinder, delay and defraud the creditors of said company, and particularly said Vose, Livingston & Co., and to enable said company to apply the then future earnings of said railroad to the completion thereof, in defiance of the just claims and demands of the creditors of said company.

That until set aside, as hereinafter set forth, said lease and judgment did hinder and delay said creditors, and enabled Chamberlain to carry on and prosecute its said business for its own benefit and in defiance of its creditors; and that for these reasons said lease and judgment were ever void in law, without regard to the intent of the parties thereto.

That while said Chamberlain was in possession of said premises, one Newcomb Cleveland recovered a judgment against said company for $111,700.71 damages and costs, and issued execution and levied on the property described in and conveyed by said lease, and afterwards and on the 31st day of October, 1857, said Cleveland exhibited on the equity side of said district court his bill of complaint against said La Crosse and Milwaukee Railroad Company, Selah Chamberlain, and others, asking that said lease and judgment might be canceled and set aside, which bill was answered by said company and said Chamberlain, and a final decree rendered thereon, vacating and setting aside said lease and judgment. That said Chamberlain took an appeal to the supreme court, which was dismissed by the supreme court, February 1st, 1862, and that Chamberlain remained in possession of said leased property until May 18th, 1860, and in the receipt of the rents, revenues and tolls thereof.

That on the first day of September, 1859, $40,000 of interest became due and payable on the Bronson and Soutter mortgage, which was to have been paid by said Chamberlain out of the net revenues received under said lease; that Chamberlain at that time had in his hands moneys more than sufficient to pay the same, derived from the said lease, but that he neglected to pay the same, or any part thereof, and that afterwards

and on the 9th day of December, 1859, said Bronson and Soutter commenced a suit in the district court of the United States to foreclose said mortgage. And the further sum of $40,000 became due on the first of March, 1860, while said Chamberlain remained in possession as aforesaid.

That afterwards and on the 18th day of May, 1860, said Chamberlain having over $100,000 of the income of said road in his hands, voluntarily surrendered said leased premises to said Bronson and Soutter, as mortgagees, as aforesaid, and thereby voluntarily waived, abandoned and surrendered, all right or claim to the possession of said railroad, rolling stock and franchises described in said lease, and thereby estopped himself from setting up any claim under said lease. Nevertheless, said Chamberlain pretends that said lease and judgment are in full force, have not been canceled, and that he is entitled to take possession of said railroad and property under said lease. That said judgment still remains upon the records uncanceled, and that said lease is still in his possession and of record, and that said lease and judgment are a lien upon the rights of your orator, and enable said Chamberlain to pretend that they are encumbrances upon said railroad and appurtenances. The bill prays that Chamberlain may be enjoined from setting up any right or claim under said lease and judgment, and may be decreed to deliver up said lease, to be canceled and acknowledged satisfaction of said judgment, and for general relief.

On the 24th day of September, 1864, the defendant Chamberlain filed his answer, admitting the lease and his possession under it, denying that it was executed fraudulently, or to hinder or delay creditors, and alleging that the company had ample power to execute, and that it was executed to secure defendant for a just indebtedness for work, labor and services, and money and materials furnished in building and repairing said road. Denies that said La Crosse company was indebted to Vose, Livingston & Co., or that said lease was executed to defraud them. Admits the confession of judgment, and says

it was for a part of the indebtedness secured by said lease, and denies all fraudulent intent to hinder or delay or defraud creditors, as charged, and defendant says the answer of this defendant filed to the bill of Newcomb Cleveland, and attached to said bill of complaint, is true, and that as to all matters of detail he adopts it as his answer in this case. Admits Newcomb Cleveland recovered a judgment against La Crosse company, issued execution, and exhibited his bill of complaint, and obtained a decree thereon, as charged, but denies that complainant was a party thereto, or is in any manner affected or benefited thereby. Admits that he was in possession of said railroad and premises, May 18th, 1860, but denies that he voluntarily surrendered his possession, but says that he yielded it on demand, to a party having a prior right. Denies that he had in his hands any money applicable to payment of interest on the Bronson and Soutter mortgage, and said that he surrendered said road, protesting his right to have the property returned to him when the claim of said mortgage was satisfied. Defendant insists that said lease and judgment in his favor are valid and subsisting liens upon the said railroad against said complainants, and prior and superior to any claim it can assert. Sets up the decree dismissing complainants bill for the same identical matters of fact here set up, on the 29th day of June, 1863, in the circuit court, and claims it to be a bar to this action. Said bill so dismissed was appealed to the supreme court, and heard December term, 1865, as No. 151, and the decree affirmed by the supreme court, and is reported in 3 Wallace, 704.

Record, 117 to 119.

On the 17th of April, 1865, The Minnesota and St. Paul railway company had leave to intervene as a defendant in this cause, and file a cross bill.

Record, 121.

On the 23d day of May, 1865, the St. Paul company filed its answer, setting up, on information and belief, substantially

the same matters as are set up in the answer of Chamberlain, and further showing that prior to May, 1864, this said defendant, St. Paul company, became the owner of said lease and judgment, and has paid said Chamberlain full value therefor, that said judgment and lease are valid and subsisting liens against said La Crosse and Milwaukee railroad company, and liens on said railroad as against said complainant in this cause, and prior and superior to any lien or claim which it can assert. Sets up the former bill of the Minnesota company against said Chamberlain, which was dismissed as a bar to this suit, and claims the benefit of said decree, the same as though it had been plaintiff. That on the 9th of December, 1859, Bronson and Soutter brought suit to foreclose said second mortgage, and made said Chamberlain and said complainants in this cause defendants. That said Minnesota company answered in that suit the same matters set up in this suit. That a reference was had and a litigation in that suit between said Minnesota company and said Chamberlain of the same matters here set up, and that the masters to whom the same was referred reported the claim of Chamberlain under said lease and judgment free from fraud, and a valid and subsisting claim which was confirmed, and the defendant claims that said Minnesota company is now estopped to dispute the same.

Record, pp. 122 to 126.

On the same day the St. Paul company filed its cross-bill against said Minnesota company and Selah Chamberlain, setting forth the aforesaid indebtedness of said La Crosse company to said Selah Chamberlain, and the consideration thereof, the execution and delivery of said lease as security therefor, and the possession of Chamberlain under the same, and that said road was so far completed by said Chamberlain in November, 1858, that trains run through from Milwaukee to La Crosse, and that said Chamberlain continued to possess the same under said lease until May, 1860, when he surrendered the possession thereof as hereinafter particularly set forth.

That on the 2d day of October, 1857, in order further to secure said indebtedness, said company confessed a judgment to said Chamberlain for $629,089.71, which still remains in full force and unsatisfied.

That said Chamberlain realized no revenue from said railroad beyond a sum sufficient to pay a portion of the interest on the encumbrances mentioned in said lease. That he surrendered possession of said road to Bronson and Soutter on their demand on their mortgage, which was prior to said lease, and reserved his right to be reinstated in possession under his lease when the claim of said mortgage was satisfied; which surrender was in writing, and copies thereof attached.

That said lease was also subject to the land grant mortgage to Bronson, Soutter and Knapp on the western division of said road, from Portage to La Crosse; that a suit was commenced to foreclose that mortgage and a receiver appointed, and said portion of said road was sold under said mortgage.

That in the latter part of the year 1857, or beginning of 1858, said La Crosse company became insolvent and utterly worthless, and that it has now no property whatever, either in possession or expectancy.

That said St. Paul company is now the equitable owner of said lease and of the indebtedness thereby secured, and of the said judgment, and that it has paid to Chamberlain the full consideration therefor, and received from him an assignment of said lease and judgment, and that it so became the owner thereof prior to the month of May, 1864.

Said bill then sets forth the allegations of the principal suit, and also that there is now due on said judgment and lease the sum of $629,089.72, and interest thereon at twelve per cent. since October 2d, 1857. That said eastern division is largely encumbered by prior mortgages, which together with said judgment far exceeds its value, and that is in the hands of a receiver; that said contract or lease is in full force, and that it and said judgment constituted a lien upon said eastern division

of said railroad, and that your orator has no adequate remedy at law, and can only obtain the fruit thereof by the interposition of this honorable court. The bill prays that said lease or mortgage may be decreed to be a valid and specific lien or encumbrance upon the said eastern division of railroad, its appurtenances and franchises, and prior and superior to any right, interest or claim of the said Milwaukee and Minnesota railroad company; and that the amount equitably due thereon may be ascertained, and that it may be decreed to be sold, with its franchises and appurtenances, and the proceeds applied to the payment due to complainant; or that said judgment may be decreed a valid lien and subsisting security in favor of complainant, and that the same creates a lien on said railroad, appurtenances and franchises; and that said railroad, and its appurtenances and franchises, may be decreed to be sold to satisfy said judgment, and that a receiver may be appointed; or that the said eastern division may be delivered to said Chamberlain, to hold, use and operate the same under said lease.

Record, pp. 127 to 132.

The Minnesota company first demurred to said cross bill, and subsequently filed an answer denying the allegations of the cross bill, and the cause was heard on pleading and proofs.

Record, 140 to 142.

The complainant introduced the deposition of Hugh Lee, an engineer, who testified that he was employed in August, 1861, by the Minnesota company, to re measure the work done by Chamberlain on said road, and that he spent twenty-two days in that business. His testimony tended to show that the contract price paid Chamberlain was too high, and that more work was allowed to him than was performed. Chamlain's work was performed in 1856, 7 and 8, and this pretended measurement was in 1861.

Record, 148 to 173.

Selah Chamberlain was called by complainant, and testified to receipts of road while in his possession, and to amounts

paid on mortgages mentioned in his lease, and that his work was done upon contract with company.

Record, 174 to 177.

The Barnes foreclosure proceedings, articles of association of Minnesota company, and agreement with Bronson and Soutter as to foreclosure, were given in evidence.

Record, pp. 184 to 236.

A copy of the record of the case of Selah Chamberlain vs. Newcomb Cleveland, as printed in the supreme court, was introduced in evidence by complainant.

Record, pp. 237 to 470.

The record in the case of the Milwaukee and Minnesota railroad company against Selah Chamberlain, which was heard and decided in the supreme court at the December term, 1865, was read in evidence by the defendant.

Record, pp. 471 to 514.

On pages 235 and 6 of Record is a stipulation that the depositions contained in the record of the Cleveland case might be read in this case the same as if taken in this cause. The supplemental mortgage to Bronson, Soutter and Knapp was put in evidence.

Record, 368.

The contract with Vose, Livingston & Co. was given in evidence.

Record, 370 and 371.

The depositions taken in the case of Cleveland, which are stipulated as evidence in this cause, are contained in the Record from page 373 to 463.

These depositions show that the La Crosse and Milwaukee company were owing Selah Chamberlain $629,089.72, for which amount judgment was confessed October 2d, 1867. That Chamberlain had been importunate for security for several weeks, and that the company, on the 27th of September, 1857, had executed to him the lease in question as security. That Chamberlain's only object was to get security for the amount his due, but that the directors of the company insisted

on so arranging his security as to secure the building of the road. Some evidence was also taken tending to show that the amount of work done by Chamberlain was not as much as the chief engineer of the company had estimated.

George H. Daniels, Daniel L. Wells, A. S. Van Meenen, Foster C. Dodge, Wm. R. Sill, Robert Campbell were examined by Chamberlain in this cause. Some of them to show that it was impossible for Lee, at the time he attempted to measure the work, to ascertain what had been done, and others of them testified to the correctness of the original estimates.

The testimony of Mr. Chamberlain in his own behalf is found on pages 544 to 562 of Record.

The assignment of the lease to Chamberlain, and the judgment in his favor to the Milwankee and St. Paul railway company, were read in evidence.

Record, 541 to 543.

The bill of complaint of the Minnesota company in this case claims:

1st. That the La Crosse company had no power or authority to make the lease to Chamberlain.

2d. That it was made to defraud the creditors, and particularly Vose, Livingston & Co., and that the judgment was confessed with the same design, and that they are therefore void.

3d. That the Cleveland decree vacated them and set them aside as to all parties and for all purposes.

4th. That Chamberlain voluntarily surrendered his rights under the lease, and is now estopped to claim under it.

In answer we say:—

I.

That the La Crosse and Milwaukee Railroad Company were fully authorized and empowered to make and execute said lease.

By reference to section 8 of said original charter, (Laws of 1852, p. 329,) we find that full power was given the company to lease the whole or any part of its road in express terms—as follows:

"And they shall have power to connect the said railroad or branch railroad with any other railroad or branch railroad in this State, and operate the same in connection with such other railroad or branch railroad, and to lease or purchase from said other railroad company, the whole or any part of any railroad or branch railroad owned by such company, or *to lease* or to sell to any other company the whole or any part of the railroad or any of its branches to be built or owned by this company."

This provision gives full and ample power, and we need not look farther for authority to the company to execute a lease.

This instrument, although in form of a lease, is in fact a mortgage to secure the amount due Chamberlain, with a present right of possession and authority to receive the income, and in that view the company were fully authorized to make it.

Whether denominated a lease or a mortgage, it was in the nature of security for a debt, and corporations at common law were fully authorized to mortgage or pledge their property as security for their debts.

Angell and Ames on Corporations, § 191.

It can make no difference in what manner the pledge of the property is made, whether by mortgage, lease, or any other instrument; and while there may be some doubt as to the right of a railroad to transfer its franchise without the legislative authority, there is very little doubt that railroad companies possess the power to mortgage or pledge their property, in such a mode as to transfer the beneficial use of the franchise.

Redfield on Railways, 574.

But whatever the power of this railroad company might be at common law, the statutes of Wisconsin gave them ample

powers. Sec. 9 of the charter of the La Crosse and Milwaukee Railroad Company, session laws of Wisconsin for 1852, page 329, authorized the company to "*execute and deliver all such writings, bonds, mortgages, and other securities*, &c., as they may deem proper."

The act of March 4th, 1856, published in the volume of private and local laws of that year, at page 124, authorized it "to mortgage the whole or any part of its railroad, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and priviles of said La Crosse and Milwaukee Railroad Company."

The act of October 10th, 1856, published in the general laws of that year, at page 212, authorized all railroad companies to make deeds of trust or mortgages to secure their indebtedness, and in and by such deed to pledge their property, real and personal, including their railroad with all its rights, privileges and franchises of every name and kind. Which last act is the same as the present Revised Statutes, page 510.

The counsel admits that by these acts the legislature had authorized said company to pledge its property, franchises and rights as security for its indebtedness, and had provided that on default the mortgagee or trustee might take possession of the road and its property, and operate the same; but he insists that it had not authorized a lease, and therefore that this conveyance was unauthorized. But the original charter, as we have seen above, authorized the company to execute and deliver all such *writings, bonds, mortgages and other securities*, as they might deem proper. This language was certainly broad enough to cover a lease, but, as we have seen above, it was also authorized in express terms.

The legislature had, by the acts above referred to, expressly authorized the transfer of all the franchises of the corporation. It thereby established the public policy of the State upon this subject. This question of authority to pledge the franchise of

the company, has only arisen where the legislature have made no provision on the subject—where they have not established the policy of the state. But having authorized the pledge or transfer of the corporate rights and franchises of the company as security for its indebtedness, it can make no difference whether such transfer is made by a trust deed, mortgage, or lease in the nature of a mortgage.

The appellant is not entitled to raise this question. It is a question which can only be raised by the State or the shareholders in the corporation. A creditor or other third person cannot question it.

Redfield on Railways, 575 to 591.

II.

The bill of complaint alleges that this lease was executed, and judgment confessed, in fraud of the rights of creditors, and with the intent and design to hinder, delay and defraud creditors in the collection of their debts. Granting that to be so, still no one but a creditor of the La Crosse and Milwaukee railroad company, who has established his character as such, by obtaining a judgment against said company, is entitled to attack or set them aside on that ground. As to all the rest of the world they are valid and binding.

In this case there is no proof of the existence of a creditor of the La Crosse company of any description, much less of a judgment creditor. It does appear that Cleveland was once a judgment creditor of said company, but this record shows that his judgment had passed into the hands of Chamberlain, and was no longer in hostility to this judgment and lease.

But the Minnesota company is here the attacking party, and its attack must succeed or fail on its own basis and character

alone. That company is not a creditor of the La Crosse and Milwaukee railroad company, and for that reason is not entitled to attack Chamberlain's lease and judgment as fraudulent against creditors. It stands in the place of the La Crosse company, and can no more attack this lease and judgment than the La Crose company could. It has succeeded to the rights of the La Crosse company—nothing more.

The Minnesota company has no demand of any kind against the La Crosse compony. The latter is not its debtor to any amount whatever. But said Minnesota company is a mere purchaser of the estate of the La Crosse company, subject to all liens prior to the Barnes mortgage, and is not entitled to the rights and remedies of a creditor in such case.

But if we were to admit it a creditor, still it is not a judgment creditor, and none but judgment creditors are entitled to attack a conveyance as fraudulent as to creditors.

In Hastings et al. vs. Belknap et al., 1 Denio, 190, Justice Jewett says, on page 188: "The assignment was valid as between the parties to it, and could not be impeached except by a *judgment* creditor, even if it was fraudulent as to creditors." And denied the right to a landlord, who was seeking to defend the taking of certain goods on a distress warrant, to attack an assignment as fraudulent. See also,

Frisley vs. Thayer, 25 Wendell, 369.

In Reubens vs. Joel, 13 New York, 488, the court says: "Prior to the code it was the settled law that a creditor could not restrain or question the disposition of his debtor's property until he had completed his title at law, by judgment and execution," and that case holds the same doctrine under the code.

Simple contract creditors, or creditors at large, without a judgment, have no such right. It is only after they have established their standing as creditors, by obtaining a judgment, that they are allowed to attack or set aside conveyances of their debtors alleged to be fraudulent.

A creditor who is prosecuting his suit, and with an attachment issued and levied, cannot attack a conveyance as fraudu-

lent as to creditors in order to set it aside until he has obtained judgment.

Hall vs. Stryker, 29 Barbour, 105.

Jones et al. vs. Lake, 2 Wisconsin, 210.

Eaton vs. McCarty, 2 Wisconsin, 282.

If the Minnesota company was now a creditor, still it would have no right to attack this lease for the reason that none but creditors at the time could object to it. Subsequent creditors would not have that right.

Bodley et al. vs. Goodrich, 7 Howard, 276.

2d. Neither Barnes or the Minnesota company organized by him are to be regarded as purchasers at a judgment or execution sale. His sale was only by virtue of the power given him by the La Crosse company. Purchasers at judicial sales are to some extent invested with the rights of judgment creditors, and entitled to enforce them as against fraudulent conveyances the same as judgment creditors. But it is only as possessing the rights of a judgment creditor that it can be done. Barnes does not now, and never did, possess any such right. He was by virtue of his mortgage a purchaser from that company; and his sale to himself, without the intervention of the judgment or decree of the court did not change his character; he was still simply a purchaser, and the Minnesota company organized by him could claim no other rights than those possessed by Barnes. This company, therefore, is simply a purchaser of the La Crosse company, and not a creditor of it.

The Minnesota company, as successor and assignee of the La Crosse company, possesses no rights as creditor. The La Crosse company possessed no power to set aside this lease and judgment as fraudulent against creditors, and the Minnesota company taking from the La Crosse company through Barnes as a purchaser only of such rights as the La Crosse company hod. Its condition is that of its assignor or vendor; therefore the Minnesota company, as the assignee of, or purchaser from, the La Crosse company, cannot attack this lease and judgment

as fraudulent against creditors. It is not a creditor of that company, and its condition as a purchaser from it, through the Barnes mortgage, does not give it the rights or privileges of a creditor for any purpose. The La Crosse company could sell, assign or transfer to the Minnesota company only such rights as it possessed. It could not transfer to the Minnesota company the right to prosecute this suit, even had the La Crosse company had such right.

Milwaukee and Minnesota railroad company vs. Milwaukee and Western railroad company, 20 Wisconsin 174.

Prosser vs. Edwards, 1 Young and Coll. 481.

Therefore we insist that the Minnesota company cannot maintain this action as a creditor of the La Crosse company.

As a purchaser from the mortgagor subsequent to Chamberlain's lease and judgments, the Minnesota company cannot maintain this bill to set aside and vacate said lease and judgment.

1st. The bill shows that neither Barnes or the Minnesota company were purchasers for a valuable consideration, without notice of this lease and judgment.

2d. There is no allegation in the bill that the lease and judgment were made or confessed to defraud purchasers.

The bill shows that Chamberlain was in the actual and exclusive possession of said road from the 26th day of September, 1857, until the 18th of May, 1860. That his possession commenced nine months before the giving of the Barnes mortgage, and continued for one year after the organization of the Minnesota company. This was full and complete notice to all parties of his rights. With such notice the complainant Barnes, or Minnesota company, was not a bona fide purchaser and entitled to the protection of the statute. Constructive notice was sufficient.

3d. The allegation of the bill that the lease was made, and judgment confessed, with intent to hinder, delay and defraud creditors, will not support it as intended to defraud purchasers.

"Although a deed of conveyance of land may be fraudulent and void as to creditors, yet none but creditors can take advantage of the fraud. A subsequent purchaser, with notice of such prior conveyance, is concluded by it."

Foster vs. Walton, 5 Watts, 368.

Lancaster vs. Dolan, 1 Rawle, 281.

A deed made to defraud creditors is only void as against creditors, but valid as to subsequent purchasers.

Douglass vs. Dunlap, 10 Ohio, 162.

Bank of Alexandria vs. Patton, 1 Robinson, Virginia, 538.

In Sanger vs. Eastwood, 19 Wendell, 514, Chief Justice Nelson says: "But then it must be a fraud that the purchaser may take advantage of himself. It might have been intended to defraud *creditors*, but that is a question solely between the *creditors* and the *mortgagee*. Proof of such a fact, as observed by Mr. Roberts, ought rather to prejudice than advance the claims of a purchaser."

One who purchases with notice of a prior fraudulent conveyance, though for a valuable consideration, is not protected.

Shaw et al. vs. Levy, 17 Serg't and Rawle, 99–102.

Rogers vs. Evans, 3 Indiana, 574.

A subsequent purchaser, for valuable consideration with notice, cannot impeach a prior conveyance, as without consideration, and fraudulent and collusive between the parties.

Robinson vs. Martel, 11 Texas, 149.

Fowler vs. Stoneman, 11 Texas, 478.

Hubble vs. Brockwell, 3 Sneed, 574.

A voluntary conveyance recorded under the registry act, will not be defeated by a subsequent conveyance to a purchaser for a valuable consideration, notwithstanding the original grantor remains in possession, until the subsequent conveyance is made.

Cooke vs. Kell, 13 Maryland, R.

The bill of complaint in this case alleges that this lease and judgment were fraudulent as to creditors, and further that the

complainant, the Minnesota company, is a subsequent purchaser with full notice, but is not a creditor of the La Crosse company. These allegations are insufficient to sustain the bill to set aside said lease and judgment, for the reason, that it is not alleged that said lease and judgment were made to defraud subsequent purchasers, or were fraudulent as to such purchasers, and because it appears said subsequent purchasers had full notice of said lease and judgment, and the alleged fraud as to creditors does not affect the rights or remedies of subsequent purchasers.

The sole ground upon which the Cleveland decree was made, was that the company were endeavoring by the arrangement with Chamberlain, to secure the completion of the road to La Crosse, and seeking to apply their means to that purpose, instead of applying them in payment of their debts. At that time only about 130 miles of the road was built, and 70 miles more were required to reach the Mississippi at La Crosse. These seventy miles were completed by Chamberlain to La Crosse within one year from the making the lease, and while he was in the possession of the road. The Barnes mortgage was not executed until shortly before the completion of the road by Chamberlain. The first of the Barnes mortgages, bearing date June 21st, 1858, and the supplemental mortgage on August 11th, 1858, only about two months before the final completion of the road, and none of the bonds of the Barnes mortgage were issued until after that time. This Barnes mortgage covered not only the 130 miles of road built when the Chamberlain lease was made, but, also, that which was built by Chamberlain subsequently. And the present attempt of the Minnesota Company is to deprive Chamberlain of his lien for the amount his due when his lease was made, after having had, under the Barnes mortgage, the full benefit of the road completed by Chamberlain. A moment's consideration of these facts will show the great injustice of this attempt of the Minnesota company to set

aside Chamberlain's lien on any of the grounds set forth. If it was fraudulent as to the existing creditors, it matters not to this company. It was not a creditor, and therefore not defrauded, and as a subsequent purchaser under the Barnes mortgage, it has had the benefit of this arrangement, of the trusts which the bill alleges were created in favor of the La Crosse company by the Chamberlain lease, and should not now be heard to question its validity.

Besides, our statute provides that "no conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended."

Here there is no pretence—1st, that anything was ever done with intent to defraud a subsequent purchaser; or, 2d, that Chamberlain ever had any knowledge of, or was privy to, any such intended fraud. How, then, can it be claimed that said lease and judgment were fraudulent as to creditors?

III.

There was no fraud in fact in Chamberlain's lease and judgment, but they were a security for a *bona fide* debt to him, and he had no intention to defraud either creditors or purchasers.

The claim is that said lease and judgment were void because some of the directors were influenced in giving them by a desire to protect the company.

The evidence shows conclusively that Chamberlain's only motive was to acquire security. He had applied and been pressing for it for a long time previous.

Chamberlain's testimony, Record, p. 555 *et seq.*
B. Kilbourn, Record, p. 380 *et seq.*
Charles E. Jenkins, Record, p. 383.
Hugh McFarlin, Record, p. 394.

The motives of the president and directors of the company, even if fraudulent, so long as Chamberlain did not participate in them, did not affect Chamberlain's security for a *bona fide* debt.

Marbury vs. Brooks, 7 Wheaton, 556.
Brooks vs. Marbury, 11 Wheaton, 78.
Tompkins vs. Wheeler, 16 Peters, 106.
Maguiar vs. Thompson, 7 Peters, 392.

This was not an assignment to a trustee, but a security to the party himself, and was not liable to the objection made in the case of Bodly vs. Goodrich, 7 Howard, 276. The property could have been released from Chamberlain at any time, on payment of his debt.

Leitch vs. Hollister, 4 Com., 211–216.
Dawes vs. Kissam, 10 Howard, 102.

Chamberlain's demand was contracted in good faith, and was actually subsisting at the time of the execution of the mortgage or lease and confession of judgment.

See Chamberlain's deposition, 542 to 562.
Kilbourn's deposition, 373.
C. E. Jenkins' deposition, 383.
E. W. Woodward's deposition, 456 to 463.
John McLean Stoughton's deposition, 423 to 433.
Wm. R. Lill's deposition, 433 to 447.
And Exhibits, Record, p. 447 to 457.
See also testimony of Goodrich, Kneeland and McFarlane.

B. H. Edgerton, Thomas Peverly, and Hugh Lee were examined with a view to show that more work had been estimated to Chamberlain than he had performed, and that higher prices than the work was worth.

Edgerton's deposition, Record, pp. 382, 394 and 397.

Peverly's deposition, 389 to 394.

Lee's deposition, 148 to 172.

In contradiction of the above testimony, I refer to testimony of Woodward and Sill, before cited, and the depositions of—

I. C. Brewer, Record, 423.

C. S. Gregg, Record, 413.

Thomas Daniel, Record, 414.

D. J. Whittemore, Record, 417.

See also, in regard to Lee's depositions, the depositions of—

G. H. Daniels, Record, 315 to 516.

D. L. Wells, Record, 517.

A. S. Van Meenen, Record, 518 to 520.

Foster C. Dodge, Record, 520 to 522.

William R. Sill, Record, 523 to 531.

Robert Campbell, Record, 531 to 541.

The weight of testimony is overwhelming in favor of the correctness of the estimates upon which the claim of Chamberlain is based, as to the amount of work done.

The testimony of Peverly, Edgerton and Lee, as to the prices paid for the work, is entirely irrelevant. The parties were governed by the original contracts, as to which no fraud is alleged. There is no issue on that subject.

The provisions in Chamberlain's lease relative to the completion of the road to New Lisbon, the addition, from time to time, of new rolling stock, if necessary, and the continuance of the traffic of the road, were not fraudulent as to subsequent creditors or purchasers, however they might be regarded as to the rights of then existing creditors. This Chamberlain lease

was, in fact, a mortgage, and Chamberlain must be regarded as a mortgagee in possession.

Hughs vs. Edwards, 9 Wheaton, 489.

Nugent vs. Riley, 1 Metcalf, 117.

The lease provides for nothing which a mortgagee might not do and would even be bound to do; and if the parties contracted to have done nothing more than the mortgagee could have done in the absence of any agreement, the authority to do it cannot be regarded as evidence of fraud, even against existing creditors, much less against subsequent creditors or purchasers. We therefore insist that there was no fraud in the lease or judgment to Chamberlain in any manner affecting his rights as against subsequent creditors or purchasers. And the only pretence that was ever set up that it was fraudulent in any respect was that it attempted to provide for the completion of the road to New Lisbon, to which point it was almost completed, the expense of doing which was only about $56,000, which it was insisted was a fraud in law as to the then existing creditors, without regard to the actual intent of the parties.

Record, 582 and 583.

Whether such a position can be maintained under the provisions of our statute (sec. 4 of chapter 77 of Revised Statutes of 1849), which provides that the question of fraudulent intent shall be a question of fact, it is not necessary now to discuss, inasmuch as our rights are not impeached by a creditor of the La Crosse company, either then existing or subsequent thereto.

2d. Chamberlain's judgment was confessed for the exact amount ascertained to be his due on his contract, according to the estimate returned by the chief engineer of the company.

Deposition of H. L. Palmer, Record, pp. 582 to 585.

See also deposition of Kilbourn, above referred to.

There is no ground whatever, therefore, for questioning the judgment, and it is a valid and subsisting lien upon all the

property which belonged to the La Crosse company at the time, and now claimed by the Minnesota company.

IV.

The decree in the case of Newcomb Cleveland against the La Crosse and Milwaukee railroad company and Selah Chamberlain, in the district court of the United States for the district of Wisconsin, has no effect upon the validity and force of this lease and judgment between these parties, and we are not bound by that decree.

This question was directly in issue in the case decided by this court at the December term, 1865, and requires no further argument at this time.

Minnesota company vs. Chamberlain, 3 Wallace, 704.

V.

The Milwaukee and Minnesota company filed its bill in the circuit court, June 23d, 1863, against the defendant Chamberlain, setting up the same matters of fact here set up, and praying certain relief, which was demurred to by Chamberlain, and the demurrer sustained and bill dismissed It is submitted that that proceeding is a bar to this suit.

The record of the case above referred to is found in the record of this case, pp. 471 to 514.

The decree in that case was affirmed by this court, December term, 1865.

Minnesota company vs. Chamberlain, 3 Wallace, 704.

VI.

Chamberlain did not voluntarily abandon and surrender his lease and all right and claim to the possession of said railroad,

rolling stock, franchises and other things mentioned and described in said lease, but yielded to the demand of Bronson and Soutter for the possession of the eastern division, under their mortgage, as he was bound to do, but protesting and reserving his right to be restored to the possession under his said lease whenever the claim of Bronson and Soutter, under their mortgage, should be satisfied. The western division was surrendered to Hans Crocker, receiver under the order of the court.

See written demand of Bronson and Soutter, and Chamberlain's answer, Record, pp. 119 and 120.

The Bronson and Soutter mortgage was a lien on the east division prior and superior to Chamberlain's lease, and on default of the payment of interest on that mortgage for sixty days they were entitled to the possession of the mortgaged premises; and it was the duty of Chamberlain to surrender to them on demand; and such surrender was no abandonment of his lease, or of his rights and privileges under it as to the La Crosse or Minnesota company, or any other party whose rights were subject and inferior to the rights of Chamberlain under the lease.

But it is said that Chamberlain fraudulently made default in the payment of interest on the Bronson and Soutter mortgage, in order that a foreclosure might take place. This charge is denied in the answer, and no proof was offered to sustain it. The lease and simultaneous contract [Record, 37 to 43] provides the manner in which the income of the road was to be applied, and it is claimed that Chamberlain abandoned his lease, because he failed to pay the interest on the mortgage which the lease provided he should do.

His lease required him to pay the interest out of the net income of the road.

The contract executed on the same day required Chamberlain to credit said company on the first day of July, 1858, and

on the first days of July and January thereafter with such amount as might be in his hands, from said net earnings on said days, and render the company a statement of account.

Such application was made on the first day of January, 1859. From that time to the first day of September 1859, a period of eight months. When default occurred in the payment of interest on this mortgage the total net earnings of the entire road from Milwaukee to La Crosse was only $63,175.62. As appears by the master's report. Record 132 of 1863, p. 398.

The total disbursements by Chamberlain during the same time from the net earnings.

For right of way and graveling, amounted to	$16,405 23
And for interest on mortgages paid	88,424 25
Making his total disbursement for same time	$104,829 48

As appears by the report of the master's schedule 4, said record 132, page 322 and 323, thus showing that Chamberlin was compelled to advance from his own funds during said eight months $41,653.86 in order to meet the interest required to be paid by the lease.

On the first of September the interest on the second and city mortgages fell due, amounting to over $50,000, and on the first of November following the intent on the Palmer mortgage and sinking fund amounting to $50,000more.

It was under such circumstances that default was made in the payment of the interest on this mortgage, which the counsel insist was fraudulent, an abandonment of his lease and that thereby all his rights under it were forfeited and done with a view and purpose of procuring a foreclosure of this mortgage. Any one slightly skilled in finance will readily discover a different reason, and ample cause, for the failure to pay this interest, and it is most earnestly claimed that such failure did not forfeit Chamberlain's rights under said lease, but that whenever the interest on the Bronson & Soutter mortgage is paid that he is entitled to be restored to the possession of this road under said lease.

VII.

The cross bill of the Milwaukee and St. Paul railway was the appropriate remedy to enforce the payment of said Chamberlain judgment, and to enforce said lease as a security for said debt, and the circuit court had jurisdiction for that purpose.

The bill of the Minnesota company was filed to cancel and set aside said lease and judgment. Their legality and validity as existing securities and liens upon said railroad property, was directly put in issue thereby, and in order to defend against said suit their legality and sufficiency had to be established, that being established, the Milwaukee and St. Paul railway company, the owner thereof, was entitled to have them enforced so as to get the fruits thereof; the cross bill therefore was proper, as a defence, and asking affirmative relief in order that the whole matter might be disposed of in one suit.

See authorities on page 44 and 45 of this brief.

On a bill filed for specific performance of an agreement, a cross bill is proper to have the agreement cancelled.

2 Maddock, Ch'y 430 and 31.

Where a bill was filed to be relieved against a deed and a cross bill filed by defendant to establish the deed, it was sustained as proper practice.

A bill filed to set aside and cancel a mortgage and a cross bill to foreclose it is common practice.

It is therefore assumed that a cross bill in this case was proper practice. The decree in this case, record 143, dismisses the cross bill without prejudice, for the reason that said companies were not competent to litigate the matters of the cross bill in the United States court, on account of their citizenship, and it dismisses the principal suit as to the lease without prejudice, for the same reason as the St. Paul company had become the owner thereof before the filing of the bill of the Minnesota

company, and was a necessary party, but said principal suit as to the judgment, is dismissed on the merits.

We submit that the decision in the cross suits is erroneous.

Chamberlain had a debt against the La Crosse and Milwaukee railroad company, which was unliquidated, and to secure which the La Crosse company gave the mortgage lease. Afterwards said debt was liquidated, and ascertained to be $629,089.72, for which amount judgment was rendered in the district court of the United States for the district of Wisconsin. The account of Chamberlain, or debt for the security of which this mortgage lease was given, so far as it formed the consideration of the judgment, at once merged in this judgment, from which time the lease stood as a security for that judgment, which was the only evidence then remaining of that part of said indebtedness for the security of which said mortgage lease was given. This judgment and said lease, so far as it stands as a security for the judgment, is assigned for value to the Milwaukee and St. Paul railway company. That company becomes the owner of said judgment, with all the collaterals that secure it, and files its bill in the circuit court to have this judgment enforced, and that court solemnly adjudicates that it has not the authority to enforce its own judgment, and that the owner thereof must seek his remedy on that judgment in the State tribunals. It cannot be that the circuit court fully understood what it was deciding when it dismissed said cross-bill. The decree amounts to a denial of all remedy upon the judgment. The State courts cannot entertain a bill to enforce it.

All suits in the nature of creditors' bills to enforce judgments, are in their nature ancillary and supplemental to the original suit, and may be maintained without regard to citizenship—the jurisdiction having properly attached in the principal suit.

Minnesota Co. vs. St. Paul Co., 2 Wallace, 609.

Clark vs. Mathewson, 12 Peters, 164.

Freeman vs. Howe, 24 Howard, 450.
Dunn *et al* vs. Clark, 8 Peters, 1.
Molan vs. Torrance, 9 Wheaton, 537.
Hatch vs. Dorr & Kendrick, 4 MeLean, 112.
Dunlap vs. Stetson, 4 Mason, 360.
Logan vs. Patrick, 5 Chranch. 288.

The lease, so far as it is a security to this judgment, could be enforced in any suit where the judgment could be enforced.

But whatever may be the opinion of the court in regard to enforcing the lease, we are entitled to have the judgment enforced, and the remedy on the judgment would be a sale of of all the property of the La Crosse company upon which it became a lien on the 2d day of October, 1857, under the order of the court.

The same relief that was granted in the case of James, is the remedy sought upon this judgment, and we refer the court to our brief in that case, on pages above.

No. 263, December Term, 1867.

FRANCIS VOSE, APPELLANT,

vs.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS, &c., OF GREENE C. BRONSON, TRUSTEES, AND OTHERS, APPELLEES.

The bill of complaint in this cause was filed in the circuit court on the 27th day of September, 1862, by Francis Vose, against all the parties, complainants and defendants, in the land-grant foreclosure suit. That foreclosure suit was commenced December 5th, 1859, and a final decree of foreclosure and sale made therein January 13th, 1862; and at the time this bill was filed the mortgaged premises were being advertised for sale by the marshal.

The bill of complaint sets forth that on the 3d day of December, 1856, before the execution of the land-grant mortgage, Vose, Livingston & Co., to whose rights he had succeeded, as assignee, entered into a contract with the La Crosse and Milwaukee railroad company to sell to said company 11,000 tons of railroad iron, and to be paid for in land-grant bonds, then about to be made, at eighty cents on the dollar, with an understanding that said *Vose, Livingston & Co. were to be entitled to any reduction or advantage, if any, to the subscribers or purchasers of the balance of* $2,500,000 *of said land-grant bonds to be made in* 1857, said iron to be paid for from time to time on receipt of bills of lading. That only $2,500,000 should be issued in 1857, and the iron purchased to be used in constructing the road from Portage to La Crosse, and for no other purpose. That the iron was furnished and paid for in bonds in 1857, at eighty cents on the dollar, and the bonds so received amounted to over $700,000 at par. That the land-grant mortgage was executed in December,

1856, to Bronson, Soutter and Knapp, for ten millions of dollars. That in January, 1858, a further deed was executed, by which the amount of bonds to be issued under said mortgage, which was to be a lien on the road from Portage City to La Crosse, should not exceed $4,000,000. That said company issued $2,500,000, including those issued to Vose before the making of said second deed of trust, and that they afterwards issued $1,500,000 more of said bonds.

That Vose, Livingston & Co. were merchants, and had to dispose of bonds, and for that reason it was stipulated that they should have them at the lowest price at which they were sold that year.

That said company sold large amounts of said bonds in 1857 at less than eighty cents on the dollar, and sold him five hundred and nine of said bonds, numbered from 1992 to 2,500 inclusive, at forty cents on the dollar.

That Vose & Co. continued the owners of a large amount of said bonds during 1857 and afterwards, and in consequence of the sale of said bonds at forty cents they were compelled to sell at that price, and that if the company had not sold at less than eighty cents they would have been able to have sold at a fair profit, and that in consequence of the premises they are entitled to receive about $714,000 in said bonds, in addition to what they did receive. That the iron sold was worth the price paid, and was used in laying the track from Portage to La Crosse, and no other iron was used for that purpose. That said La Crosse company is now, and since 1857 has been, utterly insolvent, and has been sold out on the Barnes mortgage, and the Minnesota company formed, and that an action at law against said company, if it could be sustained, would be nugatory, and the complainant is remediless except by this proceeding. The bill sets forth the proceedings in the land-grant foreclosure suit, and claims that the property is ample to pay the amount of decree and the amount claimed by the complainant. That a portion of the bonds were cut down in consequence of their having been sold at a discount.

That although complainant has not received the additional amount of bonds, he is advised he is entitled to share in the disposition of the proceeds of sale, the same as though he had received them, and that in consequence of the cutting down of a portion of said bonds to forty cents on the dollar there is an unappropriated lien in said mortgage liable to be applied in liquidation of said complainants said claim. That said trustees, Bronson, Soutter & Knapp, and all the defendants to said suit, knew of said complainant's claim, and that he ought to have been made a party so as to enable him to set it up, or that said Bronson, Soutter and Knapp should have set up said complainants' claim, and that as they did not do so it is not barred or foreclosed, and that the decree ought now to be modified. The bill then prays that the La Crosse company may be directed to issue to said complainants $714,000 of said bonds, and that said Bronson, Soutter and Knapp may be directed to countersign them, or that in the distribution of the proceeds of sale said complainant may receive therefrom a *pro rata* proportion thereof, the same as if such bonds had been issued.

Bronson, Soutter and Knapp demurred to said bill, and the demurrer was sustained and the bill dismissed.

I.

The decree of the court below should be affirmed.

That the bill is novel and exhibits great fertility of genius is admitted, but the legal and equitable grounds upon which it is to be sustained are not apparent.

The defendants, Bronson, Soutter and Knapp, the trustees, had no power or authority to enlarge said mortgage, or to consent to or aid in its enlargement, or to issue any additional bonds under it. All the bondholders under said mortgage would be directly and injuriously affected by any such proceeding. The mortgage, as finally amended and limited, pro-

vides for the issue of four million of bonds under it on these premises, and no more. That amount of bonds were issued and became liens on said road. The rights of those bondholders thereby became fixed, and no outside equities between the La Crosse company and any third person could be allowed to affect the relations or interests of said bondholders. No additional bonds could be issued. It might possibly be that some one might have an outside equity that would take precedence of said bonds, but that such an equity could, by any means, be injected into said mortgage so as to stand on a par with said bondholders, either by increasing said mortgage or the amount secured by it, or diminishing the interest of the bondholders *pro rata* or otherwise, so as to make room for the new comer, is a position so new and startling that it shocks our staid notions of law and the rights of parties under solemn deeds, and I am satisfied could never have had a place in a less brilliant and fervid imagination than that of the counsel opposed.

The fact that the court in making its final decree, either rightfully or otherwise, razeed a portion of the bonds, does not alter the case. The mortgage was given to secure four millions of bonds only, and whatever amount might be found due on those four millions was the amount secured, and no more.

2d. The bill could not be sustained against the La Crosse company, even, and much less against the trustees and bondholders.

The iron was delivered and the bonds received in payment, according to the contract. The contract was fully executed, and could not afterwards be opened. The agreement was to sell a quantity of iron at a given price, and to take these bonds at eighty cents on the dollar in payment, with a further agreement that the seller was to have the benefit of a lower price for said bonds, if said bonds were sold at a lower price to the subscribers therefor. The iron was delivered and

bonds received at the price stipulated. No bonds were sold at a lower price until this transaction was closed, but subsequently some were sold at a lower price, and it is now claimed that additional bonds must be issued to the complainant, or, in other words, that the bonds which he accepted at eighty cents are now to be considered as received at forty, and an additional and equal quantity to be issued to him at that price. Such is not the fair interpretation of the contract, and all that could be claimed under it would be that whenever a payment was to be made under it, the parties might inquire, Have you sold these bonds at less than eighty cents? If so, payment must be made at the reduced rate, whatever it might be; but when once payment was made and the bonds received, the matter was closed, and it was not subject to be re-opened by any subsequent reduction in the price of said bonds.

The complaint, therefore, discloses no cause of action against the La Crosse company, even, and the decree should be affirmed.

JOHN W. CARY,
of Counsel.